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Field J.

April 18. 1879
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~237~~ 35

THE UNION CONSOLIDATED SILVER-MINING COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES D. TAYLOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

FILED OCTOBER 14 1876.

Cannot sit in the case.

SUPREME COURT OF THE UNITED STATES.

No. 237.

THE UNION CONSOLIDATED SILVER-MINING COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES D. TAYLOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

INDEX.

	Original.	Print.
Complaint	1	1
Summons	5	2
Answer	11	4
Stipulation	15	5
Judgment	16	5
Findings	20	6
Bill of exceptions	27	8
Assignment of errors	52	16
Bond	56	17
Writ of error	59	18
Citation	61	19
Clerk's certificate	63	19

1 *Complaint.*

In the circuit court of the United States for the ninth circuit, district of Nevada.

JAMES D. TAYLOR, PLAINTIFF,
v.
UNION CONSOLIDATED SILVER *Silver* MINING Company, defendant.

James D. Taylor, the plaintiff named in the above-entitled action, complains of the def't, The Union Consolidated Silver Mining Company therein named, and for cause of action alleges that said defendant is a corporation organized and existing under and by virtue of the laws of the State of California.

Plaintiff further alleges that on the 11th day of October, A. D. 1862, he became, and was, and ever since has been, and now is, the owner of and entitled to the possession of, and until the wrongful act of def't hereinafter set forth was in the possession of an undivided inter-
2 est equal to five (5) feet of that mining-ground claim and lode, being on and part of the Comstock lode, situated in the Virginia mining district, county of Storey, State of Nevada, now known as the claim ground and lode of the Union Consolidated Silver Mining Company, described as follows, to wit: Commencing at the northern boundary line of what was formerly known as the Ophir Mine at a point on the Comstock lode 1,500 feet north of the present south boundary line of the Ophir Silver Mining Company's claim, and running thence northerly from said point of commencement on, along, and with said Comstock lode and including the same with all its dips, spurs, angles, and variations, three hundred (300) feet, the same being a part of the mining claim where said def't was at work at the time of the commencement of this action, to wit, on the 26th day of December, A. D. 1874.

Plaintiff further alleges that heretofore, to wit, on or about the 1st day of December, A. D. 1874, and while pl'ff was so the owner,
3 entitled to the possession, and in the possession of said mining claim, ledge, and lode, said def't entered into and upon the same and ousted pl'ff from the whole and every part thereof, and has ever since unlawfully and wrongfully withheld and still unlawfully and wrongfully withholds the whole and every part of said premises from pl'ff to his damage in the sum of five hundred dollars.

Wherefore pl'ff prays for judgment against said def't for the recovery of the possession of said undivided interest in said mining claim, and for the sum of five hundred dollars damages and costs of suit.

LEWIS & DEAL,
Att'ys for Pl'ff.

UNITED STATES OF AMERICA,
District of Nevada, ss:

James D. Taylor, being first duly sworn, deposes and says that he is the plaintiff named in the foregoing complaint, that he has heard
4 said complaint read over and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated upon information and belief, & that as to those matters he believes it to be true.

J. D. TAYLOR.

Subscribed & sworn to before me this 2d day of June, A. D. 1875.
R. M. DAGGETT,
Clerk of said Circuit Court.

(Endorsed:) In the circuit court of the United States for the ninth circuit, district of Nevada. James D. Taylor vs. Union Consolidated Silver Mining Company. Complaint. Action to recover real estate. Filed June 12, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk. Lewis & Deal, att'ys for pl't'ff.

5 *Summons.*

In the district court of the first judicial district of the State of Nevada, in and for Storey County.

JAMES D. TAYLOR, PLAINTIFF,
vs.
UNION CONSOLIDATED SILVER MINING COMpany, defendant.

Action brought in the district court of the first judicial district of the State of Nevada, in and for the county of Storey, and the complaint filed in said county in the office of the clerk of said district court on the 23d day of December, A. D. 1874.

The State of Nevada sends greeting to Union Consolidated Silver Mining Company, a corporation organized under the laws of the State of California, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the State of Nevada, in and for the county of Storey, and answer the complaint filed therein within ten days (exclusive of the day
6 of service), after the service on you of this summons, if served in said county, or if served out of said county, within twenty days, and in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to obtain judgment against you, said defendant, for the possession of an undivided interest equal to five (5) feet of that mining ground claim and lode, being on and part of the Comstock lode, situate in the Virginia mining district, Storey County, State of Nevada, known as the claim of the Union Consolidated Silver Mining Company, described as follows, to wit: commencing at the northern boundary of what was formerly known as the Ophir Mine, now known as the claim of the Mexican Gold & Silver Mining Company, and running thence northerly from the northern boundary of the claim of said Mexican Gold and Silver Mining Company three hundred (300) feet on and along with said Comstock ledge and including the same with all its dips, spurs, angles,
7 and variations said distance of three (300) hundred feet, and being a part of the claim now worked upon by said d'f't, with $500 damages for ousting pl'ff.

Pl'ff alleges that he is the owner & entitled to the possession of said undivided interest, and that he was in the possession thereof until ousted by you, said def't, on the 1st day of December, A. D. 1874, & that you still withhold possession thereof from pl'ff, all of which will more fully appear from the complaint on file, a copy of which is herewith served.

And you are hereby notified that if you fail to answer the complaint,

the said plaintiff will apply to the court for the relief prayed for in the complaint.

Given under my hand and the seal of the district court of the first judicial district of the State of Nevada in and for the county of Storey, this 23d day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.]

W. G. THOMPSON, *Clerk*,
By H. C. THOMPSON,
Deputy Clerk.

8 In the district court of the first judicial district, Storey Co., Nev.

STATE OF NEVADA,
County of Storey, ss:

JA'S D. TAYLOR, PLAINTIFF,
vs.
UNION CONSOLIDATED M. CO., DEFENDANT.

OFFICE OF THE SHERIFF OF STOREY COUNTY, NEVADA,
Virginia, the 26th day of Dec., 1874.

I hereby certify that I received the within summons on the 26th day of Dec'r, 1874, at o'clock , and duly served the same S. T. Curtis, managing agent & superintendent of defendant, by delivering to him, said S. T. Curtis, managing agent of def't herein, personally, on the 26th day of Dec., A. D. 1874, in the said county of Storey, a true copy of said summons, attached to a certified copy of the complaint in the within-entitled action, and by showing him this original.

T. A. ATKINSON,
Sheriff of Storey County, Nevada,
By GEO. S. SANDERS,
Deputy Sheriff.

VIRGINIA, *Dec. 26th*, A. D. 1874.
Fees, $6.25.

9 (Endorsed:) Received Dec. 26th, 1874. No. 3860. In the district court of the first judicial district. James D. Taylor vs. Union Consolidated Silver-Mining Company. Summons. Filed on return, this 26th day of December, 1874. W. G. Thompson, clerk, by H. C. Thompson, deputy. Lewis & Deal, attorneys for plaintiff.

STATE OF NEVADA,
County of Storey, ss:

I, W. G. Thompson, county clerk of Storey County, Nevada, and ex-officio clerk of the district court of the first judicial district of said State in and for said county, do hereby certify that the above and foregoing is a full and correct copy of the original summons in case of James D. Taylor vs. Union Consolidated Silver-Mining Company, on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said district court on this the 24th day of February, 1875.

[L. S.]

W. G. THOMPSON.

10 (Re endorsed:) Filed March 8, 1875. R. M. Daggett, clerk U. S. circuit court, by T. J. Edwards, dep. clerk.

Subscribed & sworn to before me this 2d day of June, A. D. 1875.
R. M. DAGGETT,
Clerk of said Circuit Court.

(Endorsed:) In the circuit court of the United States for the ninth circuit, district of Nevada. James D. Taylor vs. Union Consolidated Silver Mining Company. Complaint. Action to recover real estate. Filed June 12, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk. Lewis & Deal, att'ys for pl't'ff.

5 *Summons.*

In the district court of the first judicial district of the State of Nevada, in and for Storey County.

JAMES D. TAYLOR, PLAINTIFF,
vs.
UNION CONSOLIDATED SILVER MINING COMPANY, defendant.

Action brought in the district court of the first judicial district of the State of Nevada, in and for the county of Storey, and the complaint filed in said county in the office of the clerk of said district court on the 23d day of December, A. D. 1874.

The State of Nevada sends greeting to Union Consolidated Silver Mining Company, a corporation organized under the laws of the State of California, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the State of Nevada, in and for the county of Storey, and answer the complaint filed therein within ten days (exclusive of the day
6 of service), after the service on you of this summons, if served in said county, or if served out of said county, within twenty days, and in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to obtain judgment against you, said defendant, for the possession of an undivided interest equal to five (5) feet of that mining ground claim and lode, being on and part of the Comstock lode, situate in the Virginia mining district, Storey County, State of Nevada, known as the claim of the Union Consolidated Silver Mining Company, described as follows, to wit: commencing at the northern boundary of what was formerly known as the Ophir Mine, now known as the claim of the Mexican Gold & Silver Mining Company, and running thence northerly from the northern boundary of the claim of said Mexican Gold and Silver Mining Company three hundred (300) feet on and along with said Comstock ledge and including the same with all its dips, spurs, angles,
7 and variations said distance of three (300) hundred feet, and being a part of the claim now worked upon by said d'f't, with $500 damages for ousting pl'ff.

Pl'ff alleges that he is the owner & entitled to the possession of said undivided interest, and that he was in the possession thereof until ousted by you, said def't, on the 1st day of December, A. D. 1874, & that you still withhold possession thereof from pl'ff, all of which will more fully appear from the complaint on file, a copy of which is herewith served.

And you are hereby notified that if you fail to answer the complaint,

the said plaintiff will apply to the court for the relief prayed for in the complaint.

Given under my hand and the seal of the district court of the first judicial district of the State of Nevada in and for the county of Storey, this 23d day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] W. G. THOMPSON, *Clerk*,
By H. C. THOMPSON,
Deputy Clerk.

8 In the district court of the first judicial district, Storey Co., Nev.

STATE OF NEVADA,
County of Storey, ss:

JA'S D. TAYLOR, PLAINTIFF,
vs.
UNION CONSOLIDATED M. CO., DEFENDANT.

OFFICE OF THE SHERIFF OF STOREY COUNTY, NEVADA,
Virginia, the 26th day of Dec., 1874.

I hereby certify that I received the within summons on the 26th day of Dec'r, 1874, at o'clock , and duly served the same S. T. Curtis, managing agent & superintendent of defendant, by delivering to him, said S. T. Curtis, managing agent of def't herein, personally, on the 26th day of Dec., A. D. 1874, in the said county of Storey, a true copy of said summons, attached to a certified copy of the complaint in the within-entitled action, and by showing him this original.

T. A. ATKINSON,
Sheriff of Storey County, Nevada,
By GEO. S. SANDERS,
Deputy Sheriff.

VIRGINIA, *Dec. 26th*, A. D. 1874.
Fees, $6.25.

9 (Endorsed:) Received Dec. 26th, 1874. No. 3860. In the district court of the first judicial district. James D. Taylor vs. Union Consolidated Silver-Mining Company. Summons. Filed on return, this 26th day of December, 1874. W. G. Thompson, clerk, by H. C. Thompson, deputy. Lewis & Deal, attorneys for plaintiff.

STATE OF NEVADA,
County of Storey, ss:

I, W. G. Thompson, county clerk of Storey County, Nevada, and ex-officio clerk of the district court of the first judicial district of said State in and for said county, do hereby certify that the above and foregoing is a full and correct copy of the original summons in case of James D. Taylor vs. Union Consolidated Silver-Mining Company, on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said district court on this the 24th day of February, 1875.

[L. S.] W. G. THOMPSON.

10 (Re endorsed:) Filed March 8, 1875. R. M. Daggett, clerk U. S. circuit court, by T. J. Edwards, dep. clerk.

11 *Answer*

In the circuit court of the United States for the ninth circuit, district of Nevada.

JAMES D. TAYLOR, PLAINTIFF,
vs.
UNION CONSOLIDATED SILVER MINING COMPANY, defendant.

Now comes the aforesaid Union Consolidated Silver Mining Company, by Garber & Thornton and W'm Woodburn, its attorneys, and defends the force and injury, when and where it shall beho've it, and says that it is in no wise guilty of the trespass and ejectment, or either of them, in the complaint of said plaintiff herein mentioned or laid to its charge, as the said plaintiff in said complaint complains against it; and thereof it puts itself upon the country.

For a further and separate plea and answer, said defendant denies that on the 11th day of October, A. D. 1862, or at any other time, the plaintiff became or was the owner of, or entitled to the possession

12 of, or in the possession of the premises or mining ground described in said complaint, or any portion thereof, or any interest, feet, or part therein or thereof; and denies that on the first day of December, A. D. 1874, or at any other time, the defendant ousted the plaintiff from said premises, or any portion thereof, or unlawfully or wrongfully or otherwise withheld the same or any portion thereof from the plaintiff; and denies that by any act or omission of the defendant or otherwise the plaintiff has sustained damage in the sum of five hundred dollars or any other sum.

And for a further and separate plea and answer the defendant alleges that neither the plaintiff nor those or any of those through or from whom he claims were or was seized or possessed of said premises or any portion thereof, or was or were the owner or owners thereof, or of any portion thereof, according to the laws or customs of the district embracing the same or otherwise, within two years next before the commencement of this action.

13 Wherefore defendant prays judgment for its costs.

GARBER & THORNTON &
W'M WOODBURN,
Defendant's Att'ys.

UNITED STATES OF AMERICA,
District of California, ss:

Robert Sherwood, being duly sworn, does depose and say that he is the president of the Union Consolidated Silver Mining Company, the corporation named as defendant in the above answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

ROBERT SHERWOOD.

Subscribed & sworn to before me this 22d day of June, A. D. 1875.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Circuit.

14 (Endorsed:) In the circuit court of the United States for the ninth circuit. (?) James D. Taylor vs. Union Consolidated Silver

Mining Company. Answer. Action of ejectment. Garber & Thornton & W. Woodburn, defendant's att'ys. Filed June 26, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

15 *Stipulation.*

In circuit court of the United States for the district of Nevada.

JAMES D. TAYLOR, PLAINTIFF,
v.
THE UNION CONSOLIDATED SILVER-MINING COMPANY.

It is hereby stipulated by and between counsel for said parties that a jury be waived, and the cause tried by the court sitting without a jury.

Sept. 15, 1875.

LEWIS & DEAL,
Att'ys for Pl'ff.
GARBER & THORNTON &
W. WOODBURN,
Att'ys for Def't.

(Endorsed:) In U. S. circ't c't, dis't of Nevada. Ja's D. Taylor v. Union Consol. S. M. Co. Stipulation waiving jury. Filed Sept. 15, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

16 *Judgment.*

In the circuit court of the United States for the ninth circuit, district of Nevada.

JAMES D. TAYLOR, PLAINTIFF,
v.
UNION CONSOLIDATED SILVER-MINING COMPANY, DEFENDANT.

The above entitled cause came on regularly for trial in its place on the calendar in said court, at the June term thereof, to wit, on the 15th day of September, A. D. 1875, and said parties, pl'ff and def't, appearing in open court in person, and by their respective attorneys, and waiving a jury trial, and said attorneys having also prior to the trial of said cause filed in said cause in said court a stipulation waiving a jury therein, and said parties announcing themselves ready for trial, the court sitting without a jury proceeded to hear, try, and determine said
17 cause, and the court having heard all the allegations and proofs of said parties, pl'ff & def't, and having also heard the argument of counsel for said parties, the court took said cause under advisement, and the court having fully considered said cause, afterwards, on the 12th day of October, A. D. 1875, filed in said court its findings of fact and conclusions of law in said cause in favor of plaintiff and against said def't, to the effect that said pl'ff is entitled to judgment for the recovery of the possession of the undivided five (5) feet of the mining claim described in the complaint in this action with costs.

It is therefore ordered and adjudged that plaintiff, James D. Taylor, is the owner of and entitled to the possession of an undivided interest equal to five (5) feet of that mining ground, claim, and

lode being on and part of the Comstock lode situated in the Virginia mining district, county of Storey, State of Nevada, now
18 known as the claim, ground, and lode of the Union Consolidated Silver-Mining Company, described as follows, to wit: Commencing at the northern boundary line of what was formerly known as the Ophir mine, at a point on the Comstock lode 1,500 feet north of the present south boundary line of the Ophir Silver-Mining Company's claim, and running thence northerly from said point of commencement on, along, and with said Comstock lode and including the same, with all its dips, spurs, angles, and variations, three hundred (300) feet, the same being a part of the mining claim where said defendant was at work at the time of the commencement of this action, to wit, on the 26th day of December, A. D. 1874.

It is further ordered and adjudged that said pl'ff is so the owner of and so entitled to the possession of said undivided interest in said mining claim, ledge, or lode, as a tenant in common thereof with
19 said def't, The Union Consolidated Silver-Mining Company.

It is further ordered and adjudged that said pl'ff recover of said def't the possession of said undivided interest from said def't, and that he be let into possession of said mining claim, ledge, or lode with said def't, and that he recover his costs in this action taxed at one hundred and thirty-five $\frac{20}{100}$ dollars, U. S. gold coin.

Dated Carson City, Oct. 13, A. D. 1875.

(Endorsed:) Circuit court of the United States, 9th circuit, district of Nevada. James D. Taylor v. Union Consolidated S. M. Co. Judgment. Filed Oct. 13, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

20 *Findings.*

In the circuit court of the United States for the district of Nevada.

JAMES D. TAYLOR
v.
THE UNION CONSOLIDATED MINING COMPANY.

This cause having been tried by the court without a jury, the court now makes the following special finding of facts:

1st. That on the 10th day ofJune, A. D. 1859, a notice of location of a mining claim was made by E. Payne & J. Cook; that this notice was recorded on the 4th day of July, A. D. 1859; that the said notice of location was made before the adoption of rules for the location and holding of claims by the miners of the Gold Hill district, in which the claim described in said notice was situated; that in said notice the said Payne
& Cook claimed a mining claim on what is now known as the
21 Comstock quartz vein, beginning at a point 1,500 feet north of the south line of the claim of the Ophir Company and extending thence northward on said vein six hundred feet, which claim includes the ground in dispute and was known as the Union claim; that said Payne & Cook took possession of said claim, and on the 7th day of September, A. D. 1860, sold and conveyed to Alex. E. Kennedy, Shepherd McFadden, Edward Maloy, and John L. Newman, all their interest in said claim; that the last-named persons took possession of the said claim and did prospecting work thereon during the years 1860 and 1861, and that they and their successors in interest continued in possession thereof until the conveyance to plaintiff hereinafter mentioned.

2d. That during the years 1860, '61, '62, '63, & 64 the original locators of the "Union Claim," and others deriving title from them, including Wood, the immediate grantor of plaintiff, and the plaintiff, ex-
22 pended over thirty thousand dollars in prospecting and developing said claim.

3d. That on the 11th day of October, A. D. 1862, one Solomon Wood was the owner of at least an undivided fifty feet of the said "Union Claim," deriving his title thereto regularly from the original locators, Payne & Cook, and on that day sold and conveyed by deed to the plaintiff in this suit an undivided five (5) feet of said "Union Claim."

4th. That since the year 1863 the plaintiff has not done any work personally on the said claim, nor has any been done for him, except so far as the work done by his co-tenants can be considered work done for him.

5th. That on the 30th day of September, A. D. 1863, C. H. Reynolds, T. Meagher, E. Said, C. Reis, and A. L. Barnes, all of whom derived title from the original locators, Payne & Cook, sold and conveyed all their interest in said "Union Claim" to a corporation, organized
23 in and under the laws of the State of California, styled the "Union Gold and Silver Mining Company."

6th. That on the 27th day of May, A. D. 1874, the said Union Gold & Silver Mining Company sold and conveyed all its interest in the said "Union Claim" to the defendant, which is a corporation organized in and under the laws of the State of California.

7th. That the defendant and its grantors have been in the possession of the ground in dispute for more than two years before the commencement of this action.

8th. That the interest sold and conveyed by the aforesaid Solomon Wood to the plaintiff is described as follows: Five feet undivided interest in the claims of the Union Company, located upon the Comstock Silver Lead; said claims consist of three hundred feet, bounded north by the claims of the Sierra Nevada Silver Mining Company, and on the south by the claims of the Ophir Silver Mining Company.

9th. That neither the original locators of the Union Claim nor
24 their successors in interest ever had an undisputed title to more than three hundred feet of the six hundred feet located, and that that 300 feet lies next to the claim of the Ophir Company.

10th. That the plaintiff and the defendant both claim and derive title from the same source, namely, the original locators of the Union Claim, Payne & Cook.

11th. That at the time plaintiff began this suit, and for more than five months before that time, the defendant was, and ever since has been, in possession of that portion of the Comstock lode located as aforesaid, by Cook & Payne, known as the Union Claim, which begins at a point 1,500 feet north of the south line of the claim of the Ophir Company, and extends northward on said lode a distance of three hundred feet, including the ground in dispute.

12th. That on the 12th day of January, A. D. 1875, W. E. F. Deal, as attorney for the plaintiff, demanded of the defendant possession of that portion of the Comstock lode now in dispute, and the de-
25 fendant refused to admit the plaintiff or his attorney into possession; that this demand and refusal were after the commencement of this suit; that no demand was made by the plaintiff to be let into possession of the premises in dispute before the filing of the complaint in this action. But I find from other evidence in the case that the defendant was in the exclusive adverse possession of the premises in dis-

pute before the commencement of this suit, and had, in fact, ousted the plaintiff from the possession of the same.

13th. That plaintiff and defendant are tenants in common of the mining claim described in the complaint.

14th. That the value of the premises in dispute exceeds five thousand dollars.

My conclusion of law upon the foregoing facts is, that the plaintiff is entitled to judgment for the recovery of the possession of the undivided five feet of the mining claim described in his complaint with costs.

E. W. HILLYER,
District Judge.

26 (Endorsed:) In the U. S. circ't court, dist. of Nevada. Ja's D. Taylor v. Union Con. S. M. Co. Findings. Filed Oct. 12, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

27 *Bill of ex.*

In the circuit court of the United States for the ninth circuit, in and for the district of Nevada.

JAMES D. TAYLOR, PLAINTIFF,
vs.
THE UNION CONSOLIDATED SILVER MINING Company, defendant.

Bill of exceptions.

Be it remembered, that upon the trial of this cause, which took place on the 15th day of September, A. D. 1875, before the honorable Edgar W. Hillyer, United States district judge, sitting without a jury—a jury having been expressly waived by the written consent of the parties hereto filed before the commencement of the trial of said action in pursuance of the act of Congress of March 5th, 1869 (Revised Statutes of the United States, sec. 649), the following proceedings and exceptions were had:

The counsel for plaintiff offered in evidence the deposition of John W. Mackey, and the exhibits annexed thereto, marked "A and B"
28 respectively, which said deposition and exhibits are in the words and figures following:

My name is John W. Mackey, over the age of twenty-one years. I think I came to this place, Virginia City, Storey County, Nevada, in the fall of 1859, or the beginning of 1860; I knew soon after I came here, generally, the location of claims on the Comstock lode. I first knew the mining claim of the Comstock lode, which was formerly known as the claim of the Union Gold and Silver Mining Company, and which is now known as the claim of the Union Consolidated Silver Mining Company, in the spring of 1860. M'r E. Kennedy, Shepherd McFadden, Edward Malloy, and John S. Newman were working on this claim under a prospective contract from Edward Payne, J. Cook, and D. B. Cook. I saw the contract. The paper hereto annexed, marked A, I think, is a copy of the contract, but I cannot swear positively to it. Alex. Kennedy had a copy of the original notice of location of this claim; I saw it, and think the paper hereto annexed, marked B, is a copy of that no-
29 tice. These parties I have named claimed under Cook, Payne & Co., composed of Edward Payne, J. Cook, and D. B. Cook. A. Kennedy and Company, named in the contract, was composed of A. Ken-

nedy, Shep. McFadden, J. S. Newman, and Edward Malloy. These parties claimed as the Union ground on the Comstock lode the claim located by E. Payne and J. Cook under the notice of location mentioned. The Union ground was then bounded on the north by what was then known as the Miller ground, but which is now known as the claim of the Sierra Nevada Mining Company, and on the south by the Ophir or the ground which was claimed by the Atchison Company, situated in Storey County, Nevada. A tunnel had been run between 200 and 300 feet by Alex. E. Kennedy, Edw. Malloy, J. L. Newman, and S. McFadden, to prospect the claim and to strike the Comstock lode at the time when I first knew the claim. In 1860 and 1861 I continued this tunnel for A. E. Kennedy and Company, and for myself and other par-
30 ties interested in the claim, for the purpose of prospecting the claim and striking the Comstock ledge, a distance of about 800 feet further. In 1863 or 1864 I was superintendent of the Union Gold and Silver Mining Company, a corporation organized under the laws of the State of California; sunk a two-compartment shaft for the purpose of prospecting this claim and striking the Comstock lode two or three hundred feet deep. The tunnel I have spoken of cost $30,000 or $25,000. The first portion of this sum was paid by Alex. E. Kennedy & Co. and the rest was paid by purchasers from them. The shaft which was sunk by the company cost about $6,000. This was paid by the Union Gold and Silver Mining Company. There was three hundred feet undisputed of the Union ground between the Ophir on the south and the Miller on the north. The balance was in dispute. What was formerly known as the Comstock Company's claim was afterwards known as the Ophir claim.

31 On cross-examination the witness deposes as follows:

I never saw any original notice posted on the ground called the Union claim; I never saw any stakes or monuments on the ground, but J. Cook and D. B. Cook pointed out to me the lines they claimed.

Redirect examination:

I knew Solomon Wood very intimately. He paid assessments on this claim to me in 1862, on his interest in this claim.

(Signed) J. W. MACKEY.

Sworn and subscribed to before me this 14th day of September, A. D. 1875.

[SEAL.] J. H. GRAHAM,
Notary Public, Storey County, Nevada.

Exhibit A, attached to the foregoing deposition of John W. Mackey. Mining deed. Book A, page 456 C. C. R.

Cook & Payne to A. Kennedy & Co.

VIRGINIA CITY, *Sept.* 20, 1859.

32 This is to certify that we, D. B. Cook, J. Cook, and E. Payne, have this day sold, bargained, and convey' all our rights to the and interest in a certain set of mining claims to A. Kennedy & Co., said claims being situated as follows: lying and being in the Virginia district north of the Comstock claims and situated on the Comstock and Penrod vein, for and in consideration of which A. Kennedy & Co. agree to prospect the same thoroughly, and when pay dirt is struck, then Cook,

Payne & Co. agree to pay one-half of the expense and come in equal partners to the same, Kennedy & Co. receiving one undivided half of six hundred feet.

D. B. COOK.
JAMES COOK.
E. PAYNE.

Witness:
S. McFADDEN.

Filed Sept. 7, '60, at 2½ p. m.
Rec. Sept. 8, '60, at 3 p. m., page 548, vol. B, Kinsey's records.

Exhibit B, attached to the foregoing deposition of John W. Mackey.
33 *Book A, page 23, G. H. R.*

NOTICE.

That we, the undersigned, claim this spring for mining purposes, and also six hundred feet of this quartz vein, commencing at Comstock's & Company & running northward.
June 10, 1859.

E. PAINE.
J. COOK.

Recorded July 4, 1859.

V. A. K., *Recorder.*

The said Exhibit B was offered and received in evidence only so far as proven by the said deposition of John W. Mackey, and no further. To the admission in evidence of the said Exhibit A, offered by counsel for plaintiff as a deed of conveyance of an undivided three hundred feet of the premises of which the ground in controversy is parcel, counsel for defendant objected on the following grounds: That the same is not a deed, and not an instrument under seal; that it conveys no interest in the premises; that it contains no words of grant or conveyance;
34 and is immaterial and irrelevant to the issues; which said objections were overruled by the court; to which ruling and decision counsel for defendant then and there excepted.

The counsel for plaintiff then offered in evidence a certain paper writing marked Exhibit C, which is in the words and figures following:

GOLD HILL, UTAH TERRITORY, *July* 20, 1859.

This is show that I, Edward Payne, have this day admitted David B. Cook into the claim north of the Comstock and Co's stakes, as an equal partner in the six hundred feet of the quartz lead, and known as the Comstock lead, and running north of the Comstock stakes; and als' give the power to manage that claim, to work or let, as he, D. B. Cook, sees fit.

EDWARD PAYNE.
JAMES COOK.

Recorded at request of Ch. Reynolds, August 29, 1862, at 4½ p. m.

35 To the admission in evidence of the said Exhibit C, offered by counsel for plaintiff as a deed of conveyance of an undivided interest in the ground of which the premises in controversy are parcel, counsel for defendant objected on the following grounds: The same is

not a deed, and not an instrument under seal; that it conveys no interest in the premises; that it contains no words of grant or conveyance, and is immaterial and irrelevant to the issues; which said objections were overruled by the court; to which ruling and decision counsel for defendant then and there excepted. And thereupon the said Exhibit C was read in evidence.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from A. Kennedy to E. Said, purporting to convey an undivided interest of ten feet in the ground of which the premises in controversy are parcel, dated, filed, and recorded April sixth, 1860.

36 The counsel for plaintiff then offered and read in evidence a deed of conveyance from A. Kennedy to E. Said, purporting to convey an undivided interest of twenty-five feet in the ground of which the premises in controversy are parcel, dated, filed, and recorded April 6, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from A. Kennedy to Solomon Wood, purporting to convey an undivided forty feet in the ground of which the premises in controversy are parcel, dated, filed, and recorded April 6, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from S. McFadden to G. R. Lancaster, John Webber, Andrew G. Hasey, and H. F. Scott, purporting to convey an undivided interest, amounting to three hundred and thirty feet (330) of the ground of which the premises in controversy are parcel, dated Dec. 1, 1859, filed and recorded April 3, 1860.

37 The counsel for plaintiff then offered and read in evidence a deed of conveyance from Edward Malloy to E. Said, purporting to convey an undivided interest of twenty (20) feet of the ground of which the premises in controversy are parcel, dated, filed, and recorded April 5, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from G. R. Lancaster and A. G. Hasey to E. Said, purporting to convey an undivided interest of thirty-seven and a half ($37\frac{1}{2}$) feet of the ground of which the premises in controversy are parcel, dated July 11, 1860, filed and recorded July 15, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from John Webber and H. F. Scott to E. Said, purporting to convey an undivided interest of thirty-seven and a half feet ($37\frac{1}{2}$) of the ground of which the premises in controversy are parcel, dated, filed, and recorded

38 The counsel for plaintiff then offered and read in evidence a deed of conveyance from E. Said to Solomon Wood, purporting to convey an undivided interest of five (5) feet in the ground of which the premises in controversy are parcel, dated July 13, 1860, filed and recorded July 16, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from Edward Malloy to Solomon Wood, purporting to convey an undivided interest in fifty-five (55) feet in the ground of which the premises in controversy are parcel, dated, filed, and recorded April 5, 1860.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from Solomon Wood to James D. Taylor, the plaintiff in this action, purporting to convey an undivided interest of five (5) feet in the ground of which the premises in controversy are parcel, dated, filed, and recorded Oct. 11, 1862.

The counsel for plaintiff then offered and read in evidence the mining

rules of the Gold Hill district, to which the counsel for the defendant objected, on the ground that the same were passed and came into
39 force after the location of the premises in controversy; which objection was overruled by the court; to which the counsel for defendant then and there duly excepted.

The said mining rules and regulations are as follows, to wit:

MINERS' MEETING AT GOLD HILL.

At a meeting of the miners of Gold Hill, held on Saturday, June 11, 1859, A. G. Hammack was appointed chairman and V. A. Houseworth secretary.

The chairman briefly explained the object of the meeting; after which Judge Crane, in a brief and cogent speech, gave an account of his labors and exertions as Delegate of Nevada to Congress.

On motion of V. A. Houseworth it was unanimously resolved that we endorse the citizens' proceedings of Carson City, of June 6th.

On motion of B. F. Little it was unanimously resolved that the chair appoint five delegates to meet at Carson City, Eagle Valley, on June 20th, to appoint delegates of their district, to be elected by the
40 people, to the convention to be held at Genoa, Carson Valley, on the 18th day of July ensuing, to consider the public good.

The chair appointed V. A. Houseworth, J. A. Osborn, Ja's F. Rogers, L. S. Bowers, and Capt. A. A. Parker said delegates.

It was unanimously resolved that we, the miners of Gold Hill, in demonstration of respect to Judge Crane for his manly and distinguished services as Delegate to Congress, entitles him to our highest consideration.

The following preambles, rules, and regulations were unanimously adopted:

Whereas the isolated position we occupy, far from all legal tribunals and cut off from those fountains of justice which every American citizen should enjoy, renders it necessary that we organize in body politic for our mutual protection against the lawless, and for meting out justice between man and man: Therefore we, the citizens of Gold Hill and vicinity, do hereby agree to adopt the following rules and laws for our government:

ARTICLE 1ST. There shall be elected one justice of the peace,
41 one constable, and one recorder of this district, for the term of six months.

ARTICLE 2D. The duty of the justice shall be to issue all subpœnas, summons, warrants, attachments, etc., as may be required to try all civil and criminal cases, and award such judgment as the evidence of the case or the decision of the jury may require.

ARTICLE 3D. The duty of the constable shall be to serve all precepts emanating from the court, keep in custody all prisoners for crime or misdemeanors until convicted or acquitted, act as a conservator of the peace, and inflict all penalties that may be awarded against offenders.

ARTICLE 4TH. The duty of the recorder shall be to keep in a well-bound book a record of all mining claims that may be presented for record, with the names of the parties locating or purchasing, the number of feet, where situated, and the date of location or purchase; also, return a certificate for said claim or claims.

RULES AND REGULATIONS.

SECT. 1. Any person who shall willfully and with malice afore-
42 thought take the life of any person, shall, upon being duly convicted thereof, suffer the penalty of death by hanging.

SECT. 2D. Any person who shall willfully wound or maim another shall, upon conviction thereof, suffer such penalty as the jury may determine.

SECT. 3D. Any person found guilty of robbery or theft shall, upon conviction, be punished with stripes or banished, as the jury may determine.

SECT. 4TH. Any person found guilty of assault and battery, or exhibiting deadly weapons in a threatening manner, shall, upon conviction, be fined or banished, as the jury may determine.

SECT. 5TH. No banking games, under any consideration, shall be allowed in this district, under the penalty of final banishment from the district.

SECT. 6TH. The same fees shall be allowed in the justice and constable as those allowed in California, the fees to be paid by parties litigant, and the court by the laws as laid down in the California statutes, so far as applicable.

SECT. 7. Evidence of record of claims shall be considered title in preference to claims that are not recorded, nor shall the recorder
43 record more than one hill, dry-gulch, or ravine claim in the name of an individual, unless the same has been purchased.

SECT. 8. All claims shall be properly defined by a stake at each end of the claim, with the number of members forming said company and the number of feet owned.

SECT. 9. All claims shall be worked or the notice renewed in sixty days from the day of record, and no claim shall exceed two hundred feet square, hill claims excepted, which may be reduced to fifty feet front.

SECT. 10. The recorder shall be allowed the sum of twenty-five cents for recording the claim of each individual or member of a company.

SECT. 11. No Chinaman shall be allowed to hold a claim in the district.

SECT. 12. This district shall include all of the territory from the meridian of Johntown to Steamboat Valley.

SECT. 13. All quartz claims shall not exceed three hundred feet in length, including the depths and spurs.

44 SECT. 14. Any person or persons discovering a quartz vein shall be entitled to an extra claim on the veins he or they may discover.

SECT. 15. All persons holding quartz claims shall actually work to the amount of $15 to the share within ninety days from the time of locating.

SECT. 16. All persons holding quartz claims, and complying with section 15, shall hold the same for the term of 18 months as actual property.

SECT. 17. All quartz claims shall be duly recorded within thirty days from the time of locating.

SECT. 18. No person shall locate more than one claim on a vein discovered.

SECT. 19. Any and all persons locating for mining purposes shall have the same duly recorded within ten days from the time of locating.

SECT. 20. Resolved, That the above rules and regulations shall be signed by the citizens of this district and all who may locate hereafter.

On motion, it was unanimously resolved that the proceedings of this meeting be published in the Territorial Enterprise, in Carson Valley.

45 J. A. Osborn was duly elected justice of the peace; Ja's H. Rogers, constable; V. A. Houseworth, recorder.

On motion the meeting adjourned.

A. J. HAMMACK,
Chairman.

V. A. HOUSEWORTH,
Secretary.

STATE OF NEVADA,
County of Storey, ss:

I, Charles Rawson, county recorder in and for Storey County, Nevada, and custodian of the mining records of Gold Hill mining district in said county, hereby certify the foregoing to be a correct copy of the mining laws of said Gold Hill m'g district, passed June 11, 1859.

Witness my hand & official seal May 8, 1874.

[SEAL.] CHARLES RAWSON,
Recorder, Storey Co., Nev.

The counsel for plaintiff then offered and read in evidence a duly certified copy of the certificate of incorporation of the Union Gold
46 and Silver Mining Company, by which it appeared that the said company was a corporation duly organized and existing under the laws of the State of California.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from E. Said to G. S. Barnes, purporting to convey an undivided interest of five (5) feet in the ground of which the premises in controversy are parcel, dated July 13, 1860, filed and recorded July 16, 1860.

The counsel for plaintiff then offered and read in evidence the paper writing marked Exhibit C, hereinbefore set forth and described, subject to the same objection, ruling, and exception as when first offered and read.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from D. B. Cook, James Cook, and Edward Payne, by his att'y in fact, D. B. Cook, to Charles H. Reynolds, purporting to convey all the right, title, and interest, of them and each of them, of and to the mining ground of which the premises in controversy are parcel, dated and recorded Aug. 29, 1862.

47 The counsel for plaintiff then offered and read in evidence a deed of conveyance from Charles H. Reynolds, T. Meagher, E. Said, C. Reis, and A. S. Barnes, to Union Gold and Silver Mining Company, purporting to convey all the interest of the grantors in and to the mining ground of which the premises in controversy are parcel, dated Sept. 30, 1863, recorded Oct. 15, '63.

The counsel for plaintiff then offered and read in evidence a duly certified copy of the certificate of incorporation of the Union Consolidated Silver Mining Company, the defendant in this action, by which it appears that the said company is a corporation duly organized and existing under the laws of the State of California.

The counsel for plaintiff then offered and read in evidence a deed of conveyance from the Union Gold and Silver Mining Company to the Union Consolidated Silver Mining Company, the defendant in this action, purporting to convey all the interest of the former in the mining
48 ground of which the premises in controversy are parcel, dated May 27, '74, recorded May 29, '74.

The counsel for plaintiff then adduced evidence tending to prove that

on the 12th day of January, A. D. 1875, one S. T. Curtis was the general superintendent of the defendant; that work for its development was being done on the Union Consolidated claim by the defendant; that the old Ophir claim was 1,500 feet in length, and was formerly called the Penrod Comstock claim; that he was prospecting for the Comstock vein; that the Sierra Nevada claim is on the north of the Union Consolidated claim; that defendant was on the said 12th day of January, A. D. 1875, in the exclusive adverse possession of the ground in dispute, and had been in the like possession for six or seven months prior to that day and had ever since been in possession in like manner; that on said day the plaintiff demanded possession of the ground sued for in this action, which was refused.

Thereupon the plaintiff rested. All the evidence put in by plaintiff is given above.

49 And the counsel for defendant then requested the court to rule and decide that the evidence offered by the plaintiff to maintain the issues on his part, and submitted to the court, was not sufficient to maintain the action, on the following grounds:

First. That the said plaintiff has not shown that the legal title to any portion of the premises in controversy is in him.

Second. That the said plaintiff has not shown a compliance with the local rules and regulations of the mining district under which the said premises were located, and in which they are situate.

Third. That the evidence does show an abandonment of the premises in controversy by the plaintiff.

Fourth. That the said plaintiff has not been in possession of the said premises for the term of twelve years next before the commencement of this action, and that the said action is therefore barred by the statute of limitations.

Fifth. That there is no evidence tending to show any ouster of
50 the plaintiff by the defendant prior to the commencement of this action.

But the court refused to so rule or decide, to which the counsel for defendant then and there duly excepted.

The counsel for plaintiff then admitted that the defendant and its grantors were in the possession of the premises in dispute for more than two years before the commencement of this action, and that the plaintiff has not worked the ground nor had any one to work it for him except his tenants in common, the defendant and its predecessors in interest since the fall of 1863. That after the submission of the cause, and the same had been taken under advisement by the court, the counsel for defendant asked leave to make proof as to the value of said property. That counsel for plaintiff objected to reopening the case for that purpose; that notwithstanding such objection the court opened the case and allowed such proof, counsel for plaintiff excepting to such ruling. That thereupon it was shown that the property was of
51 the value of over five thousand dollars.

And because these matters do not appear of record, the counsel for the defendant hath presented this his said bill of exceptions unto the court, and prays that the same may be sealed, which is accordingly done.

Dated Carson City, November 24, 1875.

E. W. HILLYER, [L. S.]
District Judge.

(Endorsed:) U. S. circuit court, 9th circuit, Nevada. James D. Tay-

or vs. Union Consolidated Silver Mining Company. Bill of exceptions. Filed Dec. 11, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

52 *Assignment of errors.*

In the Supreme Court of the United States of America. Of October term, in the year of our Lord one thousand eight hundred and seventy-six.

UNION CONSOLIDATED SILVER MINING COMPANY, plaintiff in error,
v.
JAMES D. TAYLOR, DEFENDANT IN ERROR.

Assignment of errors.

Afterwards, to wit, on the second Monday in October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Union Consolidated Silver Mining Company, by John Garber, Harry J. Thornton, and William Woodburn, esquires, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The said court erred in ruling and deciding that the paper
53 marked Exhibit A, set forth and described in the bill of exceptions on file herein, was a deed, or that the same was competent or operative to convey or transfer any interest or estate in the premises whereof the land in controversy is parcel, and also in admitting the same to be read in evidence in this action.

Second. The said court erred in ruling and deciding that the paper marked Exhibit C, set forth and described in the bill of exceptions on file herein, was a deed, or that the same was competent or operative to transfer or convey any interest or estate in the premises whereof the land in controversy is parcel, and also in admitting the same to be read in evidence in this action.

Third. The said court erred in refusing to rule and decide as requested by counsel for defendant upon the conclusion of the evidence for the plaintiff; that the evidence offered by the plaintiff and submitted to the court
54 was not sufficient to maintain this action, for the reasons given and set forth in the said bill of exceptions.

Fourth. The court erred in holding and deciding upon the finding of facts made and on file herein that the plaintiff was entitled to recover five feet of the mining ground in the possession of the defendant, because the said findings find evidence tending to show that the plaintiff is seized of five feet in six hundred feet of the original claim of the defendant, and finds that the defendant is only in possession of one-half or three hundred feet of the said original claim, wherefore the plaintiff is only entitled to recover, if anything, two and one-half feet of the said ground in the possession of the defendant.

Fifth. The court erred in its conclusion of law upon the said findings that the plaintiff was entitled to judgment in this action, in this, that the court does not find the fact of the ownership and seizure of the plaintiff as alleged in the complaint and denied in the answer
55 herein; and further, in this, that from said findings it appears that the only claim of the plaintiff was to an undivided one one hundred and twentieth $\frac{1}{120}$ or two and one-half feet of the premises described in the complaint.

Sixth. The court erred in giving judgment for the plaintiff, in this, that the facts found by the court are insufficient to support the said judgment.

And the said Union Consolidated Silver Mining Company prays that the judgment aforesaid may be reversed and altogether held for nought, and that he may be restored to all things that he hath lost by reason of the said judgment.

JOHN GARBER,
HARRY I. THORNTON,
WILLIAM WOODBURN,
Att'ys for Pl'ff in Error.

(Endorsed:) Supreme Court of the United States. Union Consolidated Silver Mining Co., pl'iff in error, vs. James D. Taylor, def't in error. Assignment of errors. Filed Nov. 24, 1875. R. M. Daggett, clerk, by T. J. Edwards, dep. clerk.

56 *Undertaking.*

In the Supreme Court of the United States of America.

UNION CONSOLIDATED SILVER MINING COMPANY, plaintiff in error,
v.
JAMES D. TAYLOR, DEFENDANT IN ERROR.

THE UNITED STATES OF AMERICA, *ss:*

Know all men by these presents, that we, Sam. Doake and Sam. T. Curtis, of the State of Nevada, are held and firmly bound unto James D. Taylor, of the county of Storey and State of Nevada, in the sum of three hundred dollars, to be paid to the said James D. Taylor, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this day of twentieth November, A. D. 1875.

57 Whereas the above-named Union Consolidated Silver Mining Company hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the ninth circuit, in and for the district of Nevada:

Now, therefore, the condition of this obligation is such that if the above-named Union Consolidated Silver Mining Company shall prosecute its said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

SAM. DOAKE. [SEAL.]
SAM. T. CURTIS. [SEAL.]

UNITED STATES OF AMERICA,
District of Nevada, ss:

Sam. Doake and Sam. T. Curtis, being by me, R. M. Daggett, clerk of the district court of the United States for the district of Nevada,

58 the same being the sureties named in the within obligation and being by me first duly sworn, deposes and says each for himself and not for the other, that he is a resident of Virgina City, State of Nevada, and is worth the sum of three thousand dollars over and above

all his just debts and liabilities, exclusive of property exempt from execution.

SAM. DOAKE.
SAM. T. CURTIS.

Subscribed and sworn to before me this 20th day of November, A. D. 1875.

[L. S.] R. M. DAGGETT,
Clerk U. S. Dist. Court, Dist. of Nevada.

(Endorsed:) Supreme Court of the United States. Union Consolidated Silver Mining Company, pl'tiff in error, vs. James D. Taylor, defendant in error. Bond. Approved. E. W. Hillyer, judge. Filed Nov. 24, 1875. R. M. Daggett, clerk U. S. circuit court dist. of Nevada, by T. J. Edwards, dep. clerk.

59 *Writ of error.*

In the Supreme Court of the United States of America.

UNION CONSOLIDATED SILVER MINING COMPANY, plaintiff in error,
v.
JAMES D. TAYLOR, DEFENDANT IN ERROR.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit, in and for the district of Nevada, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between James D. Taylor, plaintiff, and Union Consolidated Silver Mining Company, defendant, a manifest error hath happened, to the great damage of said Union Consolidated Silver Mining Company, as by its complaint appears; we being willing that the error, if any hath
60 been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October, A. D. 1876, in the said Supreme Court to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of November, A. D. 1875.

[L. S.] R. M. DAGGETT,
61 *Clerk of the Circuit Court for the District of Nevada,*
By G. J. EDWARDS,
Deputy Clerk.

(Endorsed:) In Supreme Court of the United States. The Union Consolidated Silver Mining Co., plaintiff in error, v. James D. Taylor, defendant in error. Writ of error. Filed Nov. 24, 1875. R. M. Daggett, clerk U. S. circuit court dist. of Nevada, by G. J. Edwards, dep. clerk.

Citation.

In the Supreme Court of the United States of America.

UNION CONSOLIDATED SILVER MINING COMPANY, plaintiff in error,
v.
JAMES D. TAYLOR, DEFENDANT IN ERROR.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To James D. Taylor, defendant in error, greeting:

62 You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the circuit court of the United States for the district of Nevada, wherein Union Consolidated Silver Mining Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 24th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

E. W. HILLYER,
District Judge, holding the Circuit Court of the United States for the District of Nevada.

Attest:
[SEAL.]
63 R. M. DAGGETT,
Clerk of the Circuit Court of the District of Nevada,
By G. J. EDWARDS,
Dep. Clerk.

(Endorsed:) Supreme Court of the United States. Union Consolidated Silver Mining Co., pl'ff in error, vs. Ja's D. Taylor, d'f't in error. Citation. Filed Dec. 2, 1875. R. M. Daggett, clerk, by G. J. Edwards, dep. clerk.

UNITED STATES OF AMERICA,
District of Nevada, ss:

I, R. S. Clapp, United States marshal for the district aforesaid, do certify and return that I served the within citation on the within-named James D. Taylor, defendant in error, on the 29th day of November, A. D. 1875, within said district, by delivering to him a copy thereof and showing him the original citation.

R. S. CLAPP,
U. S. Marshal for the District of Nevada.

Marshal's fees, $6.64.

64 UNITED STATES OF AMERICA,
District of Nevada, ss:

I, R. M. Daggett, clerk of the United States circuit court for the district of Nevada, do hereby certify that the foregoing record contains a full, true *copy* copy of the following original papers now on file in my office in said cause of James D. Taylor against the Union Consolidated Silver Mining Company, to wit, complaint, summons, answer, stipulation waiving jury, judgment, findings, bill of exceptions, assignment of errors, undertaking, writ of error, and citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in Carson City, this 3d day of October, A. D. 1876.

[SEAL.]

R. M. DAGGETT, *Clerk*,
By G. J. EDWARDS, *Dep. Clerk.*

(Indorsement on cover:) No. 237. The Union Consolidated Silver Mining Company, plaintiff in error, vs. James D. Taylor. Nevada C. C. U. S. Filed 14th October, 1876.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE UNION CONSOL. SILVER MINING CO., APPELLANT,

vs.

JAMES D. TAYLOR, APPELLEE.

Writ of Error to the United States Circuit Court for Nevada.

Argument for Appellant.

D. L. SMOOT,
Counsel for Appellant.

WALLACE & HASSETT, LAW PRINTERS, No. 419 SACRAMENTO STREET,
SAN FRANCISCO.

IN THE

Supreme Court of the United States

THE UNION CONSOLIDATED SILVER MINING CO.,
Appellant,

vs.

JAMES D. TAYLOR,
Appellee.

Writ of Error to the U. S. Circuit Court for Nevada.

Argument of Counsel for Appellant.

Statement of Case.

James D. Taylor brought ejectment against the Union Consolidated Silver Mining Company for "an undivided interest, equal to five feet," of the mining claim in Storey County, Nevada, alleged to be possessed and operated by the defendant. Counsel, by written stipulation, waived

a jury, and the whole matter of law and fact was submitted to the judge of the Circuit Court of Nevada for determination.

In the course of the trial, the defendant excepted to the reading in evidence of Exhibits "A" and "C," and the Mining Rules of Gold Hill District, introduced by the plaintiff.

Upon the close of the plaintiff's testimony, the defendant requested the Court to rule as in a demurrer to evidence, or as if instructing a jury, that the plaintiff was not entitled to recover. The Court overruled the request, and the defendant again excepted.

The defendant introduced no evidence, except to show that the property in litigation exceeded five thousand dollars in value.

Afterwards, the Court entered up a special finding of facts, and thereupon based a judgment in favor of the plaintiff for "an undivided interest, equal to five feet," of the mining claim in question.

Assignments of Error.

1st. The Court erred in admitting Exhibits "A" and "C," and the Mining Rules of Gold Hill District.

2d. The Court erred in not ruling, on the close of plaintiff's evidence, that he was not entitled to recover.

3d. On the facts found, the Court erred in giving judgment for five, instead of two and one half feet.

4th. The Court erred in giving judgment for the plaintiff, when the finding, which is special, and should therefore contain every fact essential to a recovery, does not show such facts of conveyance, possession, etc., as result necessarily in the legal conclusion that the plaintiff was entitled to the property sued for.

Points of Law.

The appellant maintains:

FIRST.—That a special finding is similar to a special verdict, and must be so constituted and construed.

Sec. 649, Rev. Stats. U. S., declares that "the finding of the Court upon the facts, which may be either general or special, shall have the same *effect* as the *verdict* of a jury.

In Insurance Co. *v.* Folsom, 18 Wall., at p. 249, the Court, in its opinion, says: "Propositions of fact found by the Court, in a case where the trial by jury is waived, as provided in the Act of Congress, are *equivalent* to a *special verdict*." *Vide*, also, Swift *v.* Muygridge, 8 Cal., 446; Sisson *v.* Barrett, 2 N. Y., 407; Breeze *v.* Doyle, 19 Cal., 101.

SECOND.—That a special verdict, and consequently a special finding, must ascertain every fact essential to the plaintiff's right of recovery.

In Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, a *venire facias de novo* was awarded, because the special verdict failed to find that the abandonment was within a reasonable time. The time of the abandonment was found; but the Court required the jury to ascertain and state that such abandonment was in due or reasonable time; otherwise, no judgment could be entered for the plaintiff.

In Barnes, etc., *v.* Williams, 11 Wheaton, 415, the special verdict failed to find that the executor had assented to the legacy sued for, and therefore a *venire de novo* was awarded, even though "in the opinion of the Court there was sufficient evidence in the special verdict from which the jury might have found the fact."

In Prentice *v.* Zane's Administrator, 8 How., 484, Judge Grier, in delivering the Court's opinion says: "This Court have decided that where in a special verdict the essential facts are not *distinctly* found by the jury, although there is sufficient evidence to establish them, the Court will not render a judgment upon such an imperfect special verdict."

THIRD.—That these essential facts must appear in the special finding affirmatively, and not depend on inference or presumption.

In Bolling *v.* The Mayor of Petersburg, etc., 3 Randolph, p. 577, Judge Carr, in delivering the opinion of the Court, says: "It is said that the corporation having for twenty-seven years been in the uninterrupted possession of the wharf, we ought to presume a conveyance from the demandant. Special verdicts leave no room for presumption."

In Barnes, etc., *v.* Williams, 11 Wheaton, 416, the Court holds the same doctrine when it says: "Although in the opinion of the Court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the Court could not, upon a special verdict, *intend it*."

In Ches. Ins. Co. *v.* Stark, 6 Cranch, 268, the Court affirmed the same rule by refusing to determine whether the time of abandonment was reasonable or not, though the verdict ascertained the time of capture by the enemy, and the time of abandonment to the Insurance Company.

In Brown, etc., *v.* Ralston, etc., 4 Rand., at p. 518, it is said that: "In an action of trover, if the jury, in a special verdict, find that the plaintiff demanded goods of the defendant, and he refused to deliver them, a *venire de novo* ought to go; because the jury have found only evidence of

a conversion, instead of finding the conversion itself."

Judge Tucker, in his Commentaries, vol. ii., p. 174, edition 1831, uses this language: "Moreover, the jury must draw the conclusion where a surrender is presumed from satisfaction, and should, by their verdict, find the surrender as a fact; for if they merely find the matter of presumption, the Court cannot itself draw the conclusion."

In Insurance Co. *v.* Folsom, 18 Wall., at p. 249, it is said: "Inferences of fact must also be drawn by the Circuit Court, as it is the Circuit Court, and not the Supreme Court, which, by agreement of the parties, is substituted for a jury."

The Circuit Court only while occupying the jury's place can perform its work. After the finding has been made, neither the Circuit nor any other Court can usurp or continue those factual functions, and by inferences, presumptions, or otherwise, add to or take from the finding, whether perfect or imperfect, ambiguous or plain, consistent or inconsistent. Smith *v.* Foaves, Noy 147, and Roll. Abr. 693, (S), pl. 1 and pl. 2.

FOURTH.—That before the plaintiff can recover, the finding must show, as existing at the time of suit commenced, the following essentials:

1st. A right of entry in the plaintiff, or title to the property claimed.

2d. The quantity of the plaintiff's estate; whether in fee, for life or years, and his proportionate share of the common premises.

3d. An actual ouster of the plaintiff by the defendant from the entire common property.

A right of entry may be acquired by grant, devise, descent, or such possession as presumes a grant, and constitutes a valid defence to an action of ejectment.

In this case, it is not pretended that the plaintiff's right was acquired by devise or descent. His right, if any, rests upon grant or possession. And it cannot be argued, with much show of propriety, that he has a right of entry acquired by possession, when the special finding not only fails to set forth an adverse, notorious, and exclusive possession of the requisite duration—Turner *v.* Smith, 18 Grattan, 830—but clearly ignores the idea of a right of entry springing from possession, and places it upon the ground of grant; especially when, in finding 10, it is declared, "that the plaintiff and defendant both claim and derive title from the same source, namely, the original locators of the Union claim, Payne & Cook."

By this process, the plaintiff's right of entry is made to depend upon grant alone; and the special finding should ascertain the several con-

veyances by which, from the paramount owner, or some source common to both parties, title was transmitted to the plaintiff. If it were otherwise, the origin of the special finding would be ignored and its purpose defeated.

Under the ancient law of attaint, the jury which decided falsely, even in mixed questions of law and fact, was liable to such barbarous punishment in person, family, and estate, that, by statute, (Westm. 2, 13 Edw. I., c. 30, s. 2,) it was enacted that the justices of assize should not compel the jurors to say precisely whether it be disseisin or not, provided they state the truth of the fact and pray the aid of the justices as to the law. Under this statute, it became the practice in questions involving both law and fact—such as what constitutes a deed of conveyance, an eviction, a disseisin, a conversion, etc.—for the jury to ascertain and set forth the facts in a special verdict, and invoke the application of the law thereto by the Court. By this means the jury escaped the perils of attaint, the law was more accurately applied, justice more surely administered, and the special verdict consequently grew in favor with juries, courts, and suitors.

While in its origin the purpose of the special verdict was to escape the hazard of attaint, yet, because it accomplished also the excellent purpose of leaving the fact entirely to the jury and the law entirely to the Court, it has continued to

exist, though the harsh cause of its origin long since passed away.

The present purpose of a special verdict is to secure to litigants a more perfect decision of all matters of law than a jury can render; and in view of this purpose, we think it fair to maintain that every special finding should set forth, in *hæc verba*, the deeds of conveyance through which a plaintiff claims title—so that not only the Court below but the Court above may determine whether they are deeds in form, whether they are operative as conveyances, and also decide all such other questions of law, purely, as might arise upon an inspection of the instruments themselves.

In Bacon's Abr., title Verdict, division E, it is said: "If the jury find a deed specially, they ought to find it in *hæc verba*, and not to find what they judge to be the substance of the deed, that the Court may have an opportunity of inspecting the deed, in order to put a construction thereupon; but if the deed be lost, it is the duty of the jury to find the *substance* thereof, in case this be proved."

It might be objected, that instead of finding facts, this would be finding evidence, and imposing upon the Court the burden of drawing conclusions of fact as well as of law.

With reference to deeds, this objection is hardly tenable; for the jury finds every fact, touching such instruments, except the matter of construc-

tion, and whether they are deeds in form and effect; and upon those points, they find the instruments in *hæc verba*. And as the grant is the ultimate fact to be ascertained, and there can be no grant without a deed, it follows that the finding of the deed in *hæc verba* is a finding of the grant, provided the instrument squares with the requirements of the law, as applied by the Court.

In Virginia, from the case of Birch *v.* Alexander, 2 Wash., 34, (decided in 1791,) down to the present time, the practice has been to find the deeds in *hæc verba*. As to the practice in this matter elsewhere, *vide*, also,

Fletcher v. Peck, 6 Cranch, 95;
Dartmouth College v. Woodward, 4 Wheaton, 518;
Norris v. City of Boston, 7 How. (U. S.) 285;
Allen v. Fogler, 6 Richardson, S. Car., 57.

And in England, the practice would seem to be the same, with reference to all deeds upon which the *question at issue rests*. *Vide* Note at p. 249, vol. xv., Petersdorff's Abr.

In the case at bar, the question unavoidably *rests* upon the instruments under which the plaintiff claims. It rests upon them as to their existence; as to their form and substance; as to whether they convey the land sued for; and as to the quantity of the plaintiff's estate or interest in, and his proportionate share of, the common property.

But even if it should be held that a finding in *hæc verba* is not necessary, yet the finding should trace the plaintiff's title back to an original or common source, by short reference, at least, to each link of his chain of title; otherwise, the Court must conclude that the unmentioned link is non-existent, since the Court cannot supply a fact. As to the last branch of this proposition, *vide*—

Barnes v. Williams, 11 Wheaton, 415;
McArthur v. Porter, 1 Peters, 626;
Patterson v. United States, 2 Wheaton, 221;
Prentice v. Zane's Adm'r, 4 How., 470;
Purcell and Wife v. Wilson, 4 Grattan, 16;
Turner v. Smith, 18 Grattan, 830.

The finding fails entirely to trace out the chain of Taylor's title. In paragraph 3, it declares that one Solomon Wood conveyed to Taylor; but when and by whom the property in dispute was conveyed to Wood, nowhere appears. It is true paragraph 3 declares that, at the time of the conveyance to Taylor, viz., October 11th, 1862, Wood was the *owner* of the property in dispute, "deriving his title thereto regularly from the original locators, Payne & Cook."

By what means he became the owner, is not revealed. Whether the process would have produced ownership or not, cannot be determined. Whether an owner in fee, for life or years, does not appear. And finding that Wood was the owner, is a departure from the purpose and na-

ture of a special verdict, and declaring a conclusion of law and fact, instead of a conclusion of fact simply. By this means the finding is deprived of its special character; for to declare that Wood had title, without showing how, implied the right to declare, in the same short way, that Taylor had title, and such a declaration would have amounted to a general verdict for the plaintiff.

In Dye *v.* Dye, 11 Cal., at page 168, Justice Baldwin, with Justice Field and Chief Justice Terry concurring, holds that the allegation in a pleading "that particular property is common property," or that a person is the "owner" of property, "is only a legal conclusion," and that it should appear *how* the property became *common*, and how the person became *owner*. They cite

Mann v. Morewood, 5 Sand., 516;
Adams v. Holley, 12 How. Pr., 330;
Thomas v. Desmond, 12 How. Pr., 321;
Russell v. Clapp, 7 Barb., 482;
Bently v. Jones, 4 How. Pr., 202;
McMurray v. Gifford, 5 How. Pr., 14;
Parker v. Totten, 10 How. Pr., 233.

The conclusion is, that treating this as a special verdict, it does not set forth the facts constituting the plaintiff's title to the property in question, and therefore does not establish his right of entry.

Instead of unequivocally establishing his right of entry, it seems to declare that the title is else-

where; that the plaintiff's right of entry is barred by the statute of limitations, and that the matter is involved in such ambiguity and uncertainty that the law cannot proceed with that rigid precision which is both desirable and necessary.

The special verdict must find the facts; not merely the evidence of facts or conclusions of law.

Hill v. Covell, 1 Comstock, 524.

Paragraph 1 states that Payne & Cook took possession of, and on September 7th, 1860, sold and conveyed to Kennedy, McFadden, Mallory, and Newman, all their interest in said claim. Nothing is said about previous sales by Payne & Cook. We must therefore conclude there were none, and that Kennedy, etc., obtained the whole claim. And yet, paragraphs 2 and 3 speak of Wood, the plaintiff's grantor, deriving title from Payne & Cook, the original locators—whether directly or indirectly is not stated. To presume that it was indirectly acquired, would be to insert a fact which the verdict should have found, if it existed. Indeed, not being found, we must conclude it did not exist; for, in the language of Judge Carr, in Brown & Sons *v.* Ferguson, 4 Leigh, p. 51, "in special verdicts, the maxim *non apparentibus et non existentibus eadem est ratio*, applies with peculiar force." If directly acquired from Payne & Cook, then Wood obtained no title, if

the conveyance was after the one to Kennedy, etc. And we cannot presume that it was before the conveyance to Kennedy, etc., nor that it was *by* a conveyance *from* Kennedy, etc., without violating the rule and adding facts to the finding. Thus there is both hiatus and uncertainty as to Wood's title, and, per necessity, as to Taylor's also.

Again, there can be no recovery by the plaintiff if his right of entry is barred by the statute of limitations.

The following sections of the Compiled Laws of Nevada apply to this branch of the argument, namely:

"1016. Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."

"1019. No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, *unless it appear* that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. *Occupation and adverse possession* of a mining claim *shall consist* in *holding and working* the same in the usual and customary mode of holding and working similar claims in the

vicinity thereof. All the provisions of this act which apply to *other* real estate, so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and, provided further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim."

1020. "No cause of action, or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question, within five years before the committing of the act in respect to which said action is prosecuted or defense made."

"1021. No peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff for possession within one year from making of such entry, or within five years from the time when the right to bring such action accrued."

"1022. In every action for the recovery of real property, or the possession thereof, the per-

son establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action."

By section 1019, the "holding and working" of a mining claim constitute the "occupation and adverse possession" thereof. The fourth finding declares that since 1863 (eleven years prior to the institution of the suit) the plaintiff personally did no work on the claim, nor was any work done for him, except as the work of his co-tenants might be considered as work done for him. From this finding, it is clear that the work of the plaintiff's co-tenants was not *intended* or *understood* to be work done for him; and whether it is so to be considered in the absence of such intention and understanding, is a question of law propounded by the finding. We say in the *absence* of such intention and understanding: 1st, because neither is found to exist; 2d, because if either existed, then the necessity for stating and relying upon the legal proposition would not have arisen; and 3d, because the finding asserts in terms that he did no work himself, and that *none was done for him*, except so far as the work done by his co-tenants can be *considered* work done for

him. Thus negativing the idea that it was *intended* or *understood* to be for him, and leaving the matter entirely dependent upon the naked effect which the law might give to such work.

Some mines are unprofitable, no matter how much worked; but *without* work, *none* are profitable. The ownership of a mine implies work—expensive work—as the means of profit. Unlike other property, the benefits of ownership depend upon and arise from costly labor. Possession without development would be valuable to no one. A mining claim is not a place on which to live or cultivate the soil. Its use is single—the process of utilization is expensive. The joint owner who shares not this burden, but when, peradventure, success crowns the expenditures of others, seeks his share of the common property, thus enriched, seeks the property of another without compensation. For him, the law entertains no peculiar consideration. Duty to him to secure his property, and duty to the adventurers to secure the full fruits of their labor, quite balance. This seems to have influenced the Legislature to adopt, in sec. 1019, the peculiar rule with reference to mining claims which requires a "*working*" as well as a "*holding*" to constitute occupation.

If the working by the defendant and its grantors was not a working by the plaintiff, then the plaintiff was not in occupation of this claim for eleven years prior to the institution of this suit.

And as the defendant and its grantors worked as well as held the claim, they were, consequently, in actual occupation and adverse possession thereof, according to the terms of the statute, during that entire period.

And since it could have been adverse only as to one claiming entry, like the plaintiff, it follows that there should have been judgment for the defendant, because, in this view, there was an ouster, or its equivalent, existing for more than the statutory limit of two years before suit was commenced.

But it may be said that the work of the defendant and its grantors was the plaintiff's work, and therefore, through the holding and work of his co-tenants, the plaintiff has all the while been in occupation. If so, then he has never been ousted; and, if never ousted, then there was no cause of action—for without actual ouster, there can be no recovery by a tenant in common against his co-tenant.

2 Minor's Institutes, 479;
4 Kent's Com., 370;
1 Thomas' Coke Lit., 784;
Doe v. Hill, 10 Leigh, 457;
Purcell v. Wilson, 4 Gratt., 16.

So, whether the work of the defendant and its grantors be considered the work of the plaintiff or not, makes no difference in the result. If considered as his work, then he was not ousted. If not so considered, then he was ousted more than

two years prior to the commencement of the suit.

Outside of this statute, it is true that the possession of one tenant in common is the possession of all, but for a reason most aptly stated by Mr. Minor in his Institutes, vol. ii., p. 479, in the following language: "As each tenant in common is entitled to an undivided portion of the whole, he is entitled to occupy the whole, and the possession of one is looked upon as a possession in the interest of all, unless it be expressly negatived."

The right of possession extends to the entire *corpus*, because unrestrained by lines of division. The possession of a tenant, when coëqual to the right of possession, is perfect, because the right of possession extends to the whole. The possession and right of possession of the one tenant being perfect, cannot be rendered more so by superadding the occupation of another; *ergo*, the possession of one is the possession of all tenants in common, so long as that relation lasts, because no other result is logically attainable. This rule, which had its origin in the ancient law denying partition to those not in possession, is, therefore, both logical and convenient.

If the rule that the possession of one tenant in common is the possession of all rests upon the preceding or similar reasons, then we must look further for something to warrant the proposition

that the work of one tenant in common is the work of all.

The difference between work and possession, is the difference between labor and wages—sowing and reaping. One is a benefit, the other a burden. To one, the occupying tenant is in law entitled *ex necessitate rei*, and holds for the benefit of himself and others. The work is a burden, and he who shares its profits without sharing its weight, takes that which is not his own.

A tenant in common cannot take the crop produced by his co-tenant's labor. (Calhoun *v.* Curtis, 4 Metcalf, 413.) Yet, if the work of one tenant inures to the benefit of all, then the crop of one should become the property of all.

Independent of statute, there is no obligation upon tenants in common to participate in the expense of improving or repairing the common property, except in the matter of repairing houses and mills fallen into decay.

1 Thomas' Co. Lit., 787;
4 Kent Com., 370;
2 Minor's Ins., 479;
1 Washburn Real Prop., 421;
Taylor v. Baldwin, 10 Barb. R., 582.

In the case of mills and houses, the writ *de reparatione facienda* at common law, and latterly, perhaps, an action on the case would lie to compel contribution. In these exceptional cases, the work done by one is the work of all, and a

remedy for contribution is given, in the language of Lord Coke, because "owners are in that case bound, *pro bono publico*, to maintain houses and mills which are for habitation and use of men."

1 Thomas' Co. Lit., 787.

In all cases, therefore, where contribution and compensation are denied, the work done by a tenant is for his own benefit. For to hold that it was done for another, when the law protects such other against any obligation therefor, would be to maintain a contradiction—neither the law nor equity favoring gratuities.

But so sacredly are the fruits of human labor guarded, that, in the partition of common property, equity, if possible, will assign to a tenant that part which he has improved.

Sneed v. Atherton, 6 Dana, 276;
Borah v. Archer, 7 Dana, 176;
St. Felix v. Rankin, 3 Edw. Ch., 323;
Brookfield v. Williams, 1 Green Ch., 341;
Robinson v. McDonald, 11 Texas, 385.

If his work or its results belonged to others as well as himself, this pains would not be taken.

While, therefore, in view of conclusions heretofore reached, it may not be necessary, yet we feel compelled to dissent from the suggestion, contained in the finding, that the work of the defendant and its grantors, in and since 1863, should be considered as work done by or for the plaintiff.

Again, finding 12 declares that there was an ouster prior to the institution of the suit; but, failing to ascertain the time thereof, we are left in doubt as to whether the right of entry is cut away by the statutory bar of two years. And thus it is made uncertain whether the plaintiff, in this view, is entitled to recover or not; for, according to sec. 1019 of the statute, it should affirmatively appear that he was ousted within two years prior to suit, particularly since finding 7 declares that the defendant and its grantors had been in possession of the ground in dispute for more than two years before the commencement of the action.

If the possession, mentioned in finding 7, means adverse possession, then the plaintiff's right is gone; and what else it can be construed to mean, when taken in connection with finding 12, we are at a loss to conceive. Certain it is that the adverse possession commenced some time or other before suit was brought, and we are entitled to know when that was, because rights of property hinge upon it. If two years before suit, then the property is the defendant's; if within two years, then the plaintiff, so far as this particular defence is concerned, should recover. Here is the very gist of a contest, and upon it the finding is at fault.

Finding 7 is without meaning and useless, if it is not to be understood as declaring an adverse possession—because the fact of the defendant's

simple possession or occupation passed as a concession, and permeates the entire record and finding. And why so particular to stipulate a two years' possession in finding 7, and "more than five months" in finding 11, unless in reference to the statutory defence of limitation? The defendant, as a matter of legal right, was entitled to the possession of the whole claim in common with its co-tenants; and a finding that it and its grantors had been in possession of the whole thereof for more than two years, could have had no possible utility or significance if not expressive of an adverse possession—the only character of possession which was wrongful, and which could confer a right of action on the plaintiff.

Without a vital right of entry, the plaintiff could not lawfully recover; and there was no vital right of entry, unless there was an actual ouster of less than two years' standing. The right of recovery is thus made to depend upon these two important facts, and the finding must not only show an ouster, but that it occurred within two years; otherwise, in order to a recovery, the Court must *intend* or *presume* the ouster to have been within two years and that is forbidden.

Barnes v. Williams, 11 Wheaton, 416.

If presumptions were permissible at all, instead of presuming that the ascertained ouster occurred within two years, we should, according to the law

of evidence, require the other side to show when it did occur, and until such showing, treat it as always existing; because, until the contrary is shown, the law presumes the unbroken existence of a relation or state of things once established.

1 Greenleaf's Ev., Secs. 41 and 42.

In ordinary actions of ejectment there may be recovery upon the plaintiff's title and the defendant's simple occupation of the premises; but in ejectment between co-tenants, there must not only be title in the plaintiff, and possession in the defendant, but adverse possession—an actual ouster of the plaintiff. The essential difference in the constituents of the right of recovery, is the actual ouster, which must be something more than a mere possession by the defendant of the entire *corpus*.

If it be determinable therefore from this finding, that the defendant and its grantors were for two years in possession of this property to the exclusion of the plaintiff, then there should be a judgment for the defendant. And if the time of the actual ouster be not fixed, then there should be a *venire de novo* for that reason.

Again: "In special verdicts, the maxim *non apparentibus et non existentibus eadem est ratio*, applies with peculiar force."

Brown & Sons v. Ferguson, 4 Leigh, 51.

Now, in this case, every essential to a recovery

must appear in the finding, and that which does not appear, is to be regarded as not existing. It appears that the defendant ousted the plaintiff, and held adversely to him, but it does not appear that such adverse holding lasted less than two years; therefore, it is not a fact that it *did last less* than that time—nor is it a fact in the case that it lasted more than two years. As this is an essential inquiry, question, or proposition, and is not resolved one way or the other, the finding is defective, and there should be a *venire de novo.*

Again: It appears from finding 12 that before the commencement of this suit, the defendant had ousted the plaintiff, and was in adverse possession of the premises in question. Now, as there could be no recovery by the plaintiff, in case of an ouster of two years or more, the duration of the ouster must be limited to *less* than *two years* by *fact* or *presumption*, before a judgment can be entered for the plaintiff. There is no fact in the finding so limiting the ouster; and unless the Court ignores the well settled practice, and supplements the finding by presuming that the established ouster was so limited, the judgment for the plaintiff is without authority, and should be set aside.

Furthermore: Assuming, for the sake of the argument, that the United States was the paramount owner of the property in question, it will be conceded—

1st. That the plaintiff has no title thereto, if Payne & Cook had none; and that Payne & Cook had no title, unless their ascertained proceedings produced such a result.

2d. That an interest in public lands can only be acquired by the express permission of the power intrusted by sovereign will with the disposition thereof.

3d. That at the time Payne & Cook posted notice, etc., there was no Act of Congress authorizing such proceedings, for the purpose of acquiring title to mineral lands.

4th. That the mining rules of the district in question were not adopted until after such steps had been taken.

Now, with these concessions in view, the conclusion is, that the proceedings of Payne & Cook, at the instant, amounted to nothing, and produced no title in them. Whether what they then did produced title in them or their assigns at some future time, depends upon whether or not an Act of Congress was subsequently passed reaching such a case. Was there such an Act? The Act of July 26, 1866, does not reach the difficulty, because the Act in itself is not a grant of title, and scarcely rises above a license to extract ores from public lands. And, while providing for a patent, yet the right thereto does

not exist, it would seem, when the fact of occupation is wanting, or when there is an adverse claim, as here. The Act of May 10, 1872, (*vide* U. S. Rev. Stats., sec. 2322,) recognizes and confirms such steps and proceedings only as to and for the benefit of such persons as are holding without an adverse claim existing on May 10th, 1872, and as comply with the laws of the United States and consistent State, territorial, and local regulations.

This Act excepts and does not benefit two classes of cases; and if the present falls within either, then there can be no title in the plaintiff.

The first class is where adverse claims existed on May 10, 1872.

The second is where there has not been a compliance with the State, territorial, or local regulations.

If the premises of the argument, with reference to the ouster and statute of limitations be true, then there was an adverse claim to the property in contest on May 10, 1872, and for this reason the Act of Congress did not confirm to the plaintiff any right thereto. And as the plaintiff did no work on the claim after the year 1863, his interest under the original steps was extinguished prior to the Act of Congress, because, under the local regulations, so far as he was concerned, the claim was abandoned.

As a sole owner, no right in the plaintiff, in view of the abandonment, would have existed in

1872 for the Act to recognize and confirm; and the fact that he was a joint owner makes no difference in *principle*, and should not change the *result*, as to his interest.

But it may be said that while Payne & Cook and their assigns, or even formal locators, acquired no title, as against the United States, yet their bare possession, under the law natural, secured to them the right of quiet enjoyment as against all others. That is true, but this right has no existence when the actual occupation ceases. A right of possession to a given property cannot exist in independent personalities at the same time. The right of property and the right of possession being in the United States, there can be nothing but a bare possession and the natural right to defend it in any one else. The actual possession and the right to defend it are inseparable. He who is out of possession can have no rights except the right of possession and the right of property; and as these two are in the United States, they cannot be elsewhere—*ergo*, the locator or his assign who has abandoned a claim or suffered an ouster, has no right of property or right of possession for the law to recognize or enforce.

Lore's Lessee v. Hill, 3 Harrington, 530;
Jefferson v. Howell, 1 Houston, 178;
Sheppard's Heirs v. Sheppard, N. Car. Term Rep., 545;
Duncan v. Duncan, 3 Iredell, 317.

As a matter of course, this portion of the

argument would not relate to the present case if the finding exhibited that under an Act of Congress, applicable to the given facts, the plaintiff acquired a right of possession.

The principle, whether applied to real estate or personalty, is the same.

The unauthorized possessor of a government horse cannot, for lack of title, maintain detinue for its recovery or trespass for a wrong thereto; yet, as in the land matter, such a right might be conferred by Act of Congress extending to the case. But as with the horse, so with the land, it must plainly appear that such right has passed from the public to the individual.

Where a party claims to recover on the ground of prior possession alone, that possession must be clearly and unequivocally proved, *and it must be shown to have existed at the time of defendant's entry.* It will not do to show that the plaintiff *once* had possession, and still kept up a claim.

Meyers v. McMillan, 4 Dana, Ky., 490;
Jackson v. Meyer, 3 Johns., 396.

Thus far, for the argument's sake, we have proceeded on the assumption that the paramount title to the disputed property was in the United States. But, according to the terms under which Nevada was acquired, rights and titles obtained under the ceding governments remain unimpaired, and the Court cannot, therefore, judicially know that the paramount title to the disputed property

is in the United States and not in some Spanish or Mexican grantee.

Sparrow v. Strong, 3 Wallace, 104.

Such being the case, the plaintiff can pretend to no rights under a location, unless the finding affirmatively ascertains that this was public land. Because, unless it was public land, the most formal and technical location produced no rights whatever, which then existing or subsequent legislation recognized; for all such legislation relates to locations on the public domain. Now, as the right of the plaintiff depends upon the disputed property being public domain, and the Court cannot judicially know that it is such, the special finding does not show every essential to the plaintiff's recovery when silent on this subject.

According to the maxim, *non apparentibus, etc.*, it must be considered that it was *not* public domain, and therefore the judgment should have been for the defendant instead of the plaintiff.

With reference to the first essential, therefore, we must conclude that "*a right of entry in the plaintiff, or his title to the property claimed,*" is not established, for the following reasons, viz:

1st. Because no such possession by the plaintiff is shown as ripens into title, or constitutes a right of entry.

2d. Because the conveyances, through which the plaintiff claims, are not set forth in *hæc verba*.

3d. Because the plaintiff's title is not traced back to a paramount or common source by setting forth the deeds themselves, or a short reference thereto.

4th. Because the finding shows that Payne & Cook conveyed the entire claim to Kennedy, McFadden, Mallory, and Newman, and does not show that they or their assigns conveyed any part thereof to the plaintiff, or Solomon Wood, his grantor.

5th. Because the plaintiff did no work on the claim after 1863.

6th. Because the plaintiff's right of action is barred by the statute of limitations.

7th. Because the finding does not show those facts which constitute the location recognized by law. And unless there was a location in strict legal signification, there is no right in the plaintiff, since his pretension extends to no other means of acquiring title.

8th. Because if there was a technical location, yet the case at bar, so far as the plaintiff is concerned, fell within the exceptions of the confirming act referred to.

9th. Because the finding does not ascertain the paramount title to be in the United States, and does not, therefore, ascertain the indispensable requisite of a right or title under a location.

And again: "A prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrongdoer, or a person subsequently entering without right, *if the action to regain the prior possession be brought within a reasonable time.* If, however, there has been delay in bringing the suit, the *animus revertendi* must be shown, *and the delay must be satisfactorily accounted for*, or the prior possessor will be *deemed* to have *abandoned* his claim to the possession." (Tyler on Ejectment, pp. 72–3.) Consequently, whether we look at the evidence here as on a demurrer to evidence, or at the findings as a special verdict, the judgment is wrong. The presumption of title arising from the defendant's possession is not overthrown. For the effect of the plaintiff's prior possession is rebutted by its discontinuance for about twelve years, and there is no evidence or finding as to the *animus revertendi*, or explanatory of this long delay.

Vide also as to abandonment:

Wendell's Blackstone, vol. ii. p. 9, and p. 264, note and authorities cited.
Kent's Com., vol. iii. p. 450.
Whitney v. Wright, 15 Wendell, 177.
Meyer v. McMillan, 4 Dana, 488.
Davis v. Perley, 30 Cal. 636.
Moore v. Ransom, 3 Barn. and Cress. 332.
Stockal v. Singers, 8 Ellis & Black. 31.
Crossly v. Lightower, L. R. 3 Eq. 291.
Fuentes v. U. S., 22 How. 460.
Glucknap v. Reed, 22 Cal. 468.
Harper v. Forbes, 15 Cal. 203.

In regard to the SECOND essential of the finding, viz., "*that the quantity of the plaintiff's estate, whether in fee, for life or years, and his proportionate share of the common premises,*" should be shown by the finding before the plaintiff can recover, it is submitted, as to the last branch of this requisite, that if the plaintiff's ownership is to be considered as a five six-hundredths, or a one one-hundred and twentieth of the whole, and that such whole was reduced one-half by a recovery, or otherwise, it seems reasonable to maintain that his interest should have been correspondingly reduced from five to two and a half feet, because it was an undivided interest.

And now as to the ***quantity of the plaintiff's estate.*** Since, in a case of common property, each tenant is entitled to the possession of the whole, an action of ejectment is, of necessity, a proceeding to try titles, and let in the ousted tenant, but not, by any means, to eject the tenant in possession. It is not, therefore, an action to recover a possession from one and confer it upon another, but rather an action to ascertain whether the plaintiff is, in right, a co-tenant of the defendant, and as such entitled to enjoy with the defendant the possession of the property in question. Now, this cannot be determined without showing the plaintiff's title, and that necessarily involves an exhibition of the quantity of his estate. For the same documentary or other evi-

dence which establishes his right to an undivided part of the common property, also shows the amount of such undivided interest, and whether his ownership thereof is in fee, for life or years.

Now, since the inevitable effect of ejectment between co-tenants is to settle titles, the findings therein should determine conclusively the character of the title, and judicial sentence extinguish forever all cause for future litigation.

The finding that the plaintiff is the owner of an undivided five feet, is not an ascertainment of the quantity of his estate—for he may be an owner in fee, an owner for life, or an owner for years.

We come now to the THIRD ESSENTIAL of the finding, viz: "*That an actual ouster of the plaintiff, by the defendant, from the entire common property,*" should be shown.

Doe e. d. Hellings v. Bird, 11 East., 49;
Jackson e. d. Jones v. Lyons, 18 Johns. Rep., 400;
Heinlen v. Martin et al., Supreme Court Cal., Apr. Term, 1878;
Pacific Coast Law Jour., vol i., p. 305;
Barnitz's Lessee v. Casey, 7 Cranch, 456;
McClung v. Ross, 5 Wheat., 116;
Taylor v. Hill, 10 Leigh, 477;
Purcell et al. v. Wilson, 4 Gratt., 16.

The special verdict must ascertain the ouster in case of tenants in common, and the denial of

plaintiff's title contained in defendant's plea, will not supply the deficiency.

Doe v. Hill, 10 Leigh, 477;
Barnitz's Lessee v. Casey, 7 Cranch, 456;
Purcell v. Wilson, 4 Gratt., 16.

It is to be regretted that the finding does not set forth the acts of the defendant, or the primal facts of ouster, so that the question whether or not they constitute an ouster in law might be discussed and judicially detetmined. For this reason, perhaps, the finding is imperfect and a *venire de novo* should issue. But taking the finding as it stands, with its fullest signification, it is, according to the language of paragraph 12, a declaration that the defendant only ousted the plaintiff from the "premises in dispute." Now, since the undivided five feet claimed by the plaintiff were the only premises in dispute, it follows, that the finding ascertains an ouster from that proportion only of the three hundred feet constituting the common property. Is this sufficient? Must it not be found that the defendant ousted the plaintiff from the entire common property?

As the plaintiff is not entitled to any particular five feet, how can it be said that he has been ousted from the "premises in dispute" unless it is ascertained that he has been ousted from the entire property of which the five feet are a part?

The finding that the defendant is in possession of the entire claim, does not remedy the defect,

because the defendant is entitled to the possession of the whole like any other tenant in common. The defendant must not only be in possession of the whole, but must so occupy it, as to negative the plaintiff's right to the disputed interest in the whole.

An ouster as to five feet, is a negativing of the plaintiff's right only as to that amount of land. Peradventure, the defendant holds adversely only five of the three hundred feet, and that nothing prevents the plaintiff from entering upon and enjoying the remaining two hundred and ninety-five feet, or any part thereof. It should be remembered that the finding might be strictly true, and yet the remaining two hundred and ninety-five feet be liable to or actually in the plaintiff's occupation. Would the plaintiff be entitled to judgment in such a case? If so, then if there were fifty-nine other tenants, instead of one, the defendant who had produced an ouster as to five feet would be liable to the expense and annoyance of fifty-nine actions of ejectment, though each plaintiff could, without obstruction, enter upon and occupy the common property to an extent equal to his proportionate share.

Or, suppose there were sixty tenants in common, and each one was in actual, exclusive, and adverse occupation of five feet of the said claim, will it be pretended that each one is liable to fifty-nine actions of ejectment by his ousted co-tenants, making in all the enormous number of

three thousand five hundred and forty suits concerning one piece of property? And yet each one of these sixty co-tenants would have the same right to bring his fifty-nine suits, that the plaintiff has to bring his suit against the defendant, *under this finding.*

Since it is true that a tenant in common is entitled to the possession of the entire common property, it must also be true that he is entitled to the possession of any portion thereof which is less than the whole. And as all tenants in common are entitled to a contemporaneous occupation and enjoyment of the common property, and as two tenants cannot, in the nature of things, at the same time be in the personal occupation and individual enjoyment of the same portion of the common property, it follows that the substance of this right must be sacrificed to the shadow, unless it be true that ejectment will not lie so long as the defendant exclusively occupies and enjoys no more than his proportionate share of the common estate.

If the plaintiff be already in possession of part, or be not actually ejected from the whole of the common property, his remedy is not ejectment to be let into possession of the fragment occupied by the defendant, but partition in case his actual or possible occupation is not equal in value to his proportion of the whole.

To Recapitulate:—Each tenant in common being entitled to the possession of the whole property, and the possession of one tenant being the possession of all, it is axiomatic that the possession imputed by law to an outstanding tenant is a possession of the whole where the actual occupation so far extends. The imputed possession covering the whole, the corollary is, that actual ouster from only a part leaves such imputed possession unimpaired as to the remainder. Therefore, a finding that the plaintiff was ousted from five feet of the claim, is a finding that he is still in possession of the remaining two hundred and ninety-five feet. If so, then, as of old, in case of actual or constructive possession of any part of the common property, the remedy of partition, and not ejectment, should be adopted.

Passing from the consideration of the findings, we come next, in order, to the refusal of the Court to rule upon the close of the plaintiff's testimony that he was not entitled to recover. This application is assimilated to a demurrer to evidence, or an instruction to the jury that the plaintiff is not entitled to recover upon the facts proved. As there was no jury to instruct, and none from which to withdraw the case by a demurrer to evidence, this, perhaps, was the only way by which to raise the question of law, whether the plaintiff's evidence was sufficient to warrant a recovery. The Court refused to rule

as requested; whereupon the defendant excepted, and spread upon the record the facts proved by the plaintiff.

The following questions arise:

1st. Was the defendant's request sanctioned by good practice?

2d. If so, was the plaintiff's evidence, taking it as truth, sufficient to warrant a recovery?

While it is true that this appellate tribunal will not review evidence for the purpose of determining whether certain ultimate facts are established or not, yet, it is equally true that the question now propounded involves a very different proposition, and a very different duty.

It is not, Does the evidence warrant the conclusions of fact? but, Does the evidence, admitted by the request to be truth, warrant a conclusion of law in favor of the plaintiff? One is a work in the province of fact, the other in the province of law. One is a review of fact, which is forbidden, the other a review of law, which is enjoined. One involves a weighing of evidence to settle the facts, the other a weighing of facts to settle the law. One is the work of a jury, the other the work of a court. One is a declaration of the facts, the other a declaration of the law. One is an assertion that certain facts exist, the other that, because of those facts, the law is for the plaintiff or defendant.

Since the functions of the jury, under this peculiar form of trial, are lodged in the judge, there can be no technical instruction or demurrer to evidence, because both of these incidents are predicated of dual personalities in the exercise of distinct and different offices. But, as legal proceedings have both essential and technical character, and the essential must control the technical —for *qui haeret in litera haeret in cortice*—it follows, as the operation and effect of the defendant's request is the same as an instruction to a jury or a demurrer to evidence, that these three things must be regarded as essentially the same; and, being the same, the defendant's request, like the other two, must be consonant with good practice.

Mr. Stephen, in his work on Pleading, at page 90, says: "First, a party disputing the legal effect of any evidence offered, may demur to the evidence. A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring *that he will not proceed*, because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are in general discharged from giving any verdict; and the demurrer being entered on record, is afterwards argued and decided in the Court in bank, and the judgment there given upon it may ultimately be brought before a Court of error."

Now, since an instruction to the jury that the

plaintiff's evidence is not sufficient to warrant a recovery is in matter and effect precisely the same as a demurrer to evidence, the right to ask such instruction, and have the ruling thereon reviewed on error, must be equally well established.

The authority to decide whether a pleading contains sufficient facts to constitute a cause of action, implies the right to decide whether the facts proved support the pleading.

A demurrer to a pleading admits the truth of its allegations: a demurrer to evidence admits the truth thereof, and all reasonable inferences therefrom. The right of review in the one case is not better founded than in the other.

The right of the Judge to sum up the case and state to the jury what evidence has been given to support the issue, with such remarks as he thinks necessary for their direction, (3 Blac. Com., 375,) implies the right to instruct that the evidence adduced, taking it as true, is not sufficient to authorize a recovery.

In the Mercantile Mutual Ins. Co. *v.* Folsom, 18 Wall., 237, a case similar to the one at bar, so far as the method of trial, character of request, ruling of Court, and defendant's exceptions are concerned, the Court, in its opinion at page 250, says: "Suppose the motion is regarded as a motion for a nonsuit, it was clearly one which could not be granted, as it is well settled law that the Circuit Court does not possess the power to order

a peremptory nonsuit against the will of the plaintiff.

Elmere v. Grymes, 1 Peters, 469;
Castle v. Ballard, 23 How., 172, etc.

Power to grant a peremptory nonsuit is not vested in a Circuit Court, but the defendant may, if he sees fit, at the close of the plaintiff's case, move the Court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion *is not one addressed to the discretion of the Court*, but that it presents a question of law, and that it is as much the subject of exceptions as any other ruling of the Court in the course of the trial.

Schuehardt v. Allens, 1 Wall., 370;
Parks v. Ross, 11 How., 362;
Bliven v. New England Screw Co., 23 How., 433, etc.

All things considered, the Court is inclined, not without some hesitation, *to regard the motion as one of the latter character;* and in that view, it presents the question, whether, by the terms of the policy, the risk was within it, as the proofs show that the loss occurred before the policy was issued." *Vide* also:

Gavett v. M. & L. R.R. Co., 16 Gray, 501;
Merchants' Bank v. State Bank, 10 Wall., 604;
Pleasants v. Fant, 22 Wall., 121;
R.R. v. Jones, 5 Otto, 543;
R.R. v. Huston, 5 Otto, 702.

If the request to rule that the plaintiff's evidence is not sufficient to warrant a recovery be not good practice in such trials, then we have the anomaly of a cumulative statute proving restrictive, by denying, in a trial before a jury of one, what would have been a right before a jury of twelve. It cannot be that an addition to the methods of trial will, *ipso facto*, work a destruction of the right of review, any more than a reduction of jurors from twelve to ten, or any lower number, should, *proprio vigore*, produce such a result.

As to the second question, it is submitted that the plaintiff's evidence was not sufficient to warrant a recovery, for the following reasons, namely:

1st. Because no valid location is shown. There being no local regulations in existence when Payne & Cook posted notice, etc., and the subsequent legislation only validating locations made in accordance with such regulations, it follows that the proceedings of Payne & Cook, for lack of law, had no legal sanction at the time, and received none afterwards, because not within the terms of the confirming acts.

2d. Because no legal title to the property in question is traced to the plaintiff.

Even if Payne & Cook acquired an interest in this property, such interest was alienable by deed

only. And as the plaintiff failed to trace title from Payne & Cook to himself through *deeds* of conveyance, it follows that he has no such title as will support ejectment.

A right to have the legal title conveyed, while constituting a good equity, does not authorize ejectment in the Federal Courts, even in those States where no distinct forum exists in which to enforce equities. In Swayze *v.* Burke, 12 Peters, p. 11, a case from Pennsylvania, the Court, at page 23, says: "As there is no Court of Chancery under the laws of Pennsylvania, an action of ejectment is sustained on an equitable title by the Courts of that State. Such is not the practice in the Courts of the United States; and in this case, if the plaintiffs fail to show a *paramount legal title* in themselves, they cannot recover."

Again, in Fenn *v.* Holme, 21 Howard, 481, it was held that ejectment could not be maintained on the right conferred by the location of a New Madrid certificate in Missouri, where no patent had issued on said location; because in the Federal Courts the distinction between legal and equitable remedies must be preserved. *Vide* also:

Hooper v. Scheiner, 23 How., 235;
Sheirburn v. Cordova et al., 24 How., 423.

The papers exhibited by the plaintiff not being sealed muniments of title, did not transmit more than an equity, if that.

Ejectment cannot be maintained on an equitable title.

O'Connell v. Dougherty, 32 Cal., 458.

3d. Because the evidence not only failed to show the facts of a compliance with the law governing such matters, but positively disclosed a non-compliance and abandonment by the plaintiff.

4th. Because the *facts* constituting an actual ouster from the common property before suit commenced, are not shown.

In Barnitz's Lessee *v.* Casey, 7 Cranch, at page 471, the Court says: "As, however, a tenant in common cannot, in general, maintain an action of ejectment against his co-tenant, and there are no *facts found* in this case *to prove an actual ouster*, and to take it out of the general rule, the consequence is that the judgment, [for the defendant], in the opinion of a majority of the Court, must be affirmed with costs."

5th. Because it is not shown that the claim in question is a portion of the public domain.

The plaintiff cannot recover, except upon the strength of his title; and it has not existence, much less strength, unless the property belonged to the United States. And as the plaintiff failed to prove that this portion of the land within the limits of Nevada was public domain, he failed to

lay the foundation upon which to rest a title, interest or right, under a location.

In Sparrow *v.* Strong, 3 Wallace, at page 104, the Court in its opinion, said: "The territory of which Nevada is part, was acquired by treaty. Rights and titles acquired under ceding governments, remain unimpaired under our government. We cannot know judicially, therefore, that the right and title in controversy was not so acquired."

The legislation of Nevada and of the United States, including section 910 of the Rev. Stats., recognizes rights under locations only in those cases where the paramount title to the land is in the United States.

Now, as the Court cannot judicially know that the land in question was public; and as the most formal location upon other lands would confer no title; and as the plaintiff claims under a location, it follows that his evidence establishes no title when it fails to show that the alleged location was made upon public domain.

6th. Because the evidence disclosed that the plaintiff's right of entry, if ever in existence, had been barred by the statute of limitations.

The plaintiff did not work upon or occupy the property after 1863; and as the defendant and its grantors held and worked the said claim during that time, such holding and working, under sec.

1019 of the Nevada statutes, constituted the defendant an adverse occupant.

And now, as to the alleged erroneous rulings in admitting as evidence Exhibits "A" and "C" and the Mining Rules of Gold Hill District.

Exhibit C is in the following words and figures, namely:

Gold Hill, Utah Territory, July 20, 1859.

This is —— show that I, Edward Payne, have this day admitted David B. Cook into the claim north of the Comstock and Co.'s stakes as an equal partner in the six hundred feet of the quartz lead, and known as the Comstock lead, and running north of the Comstock stakes. And als— give the power to manage that claim to work or let as he D. B. Cook sees fit.

EDWARD PAYNE.
JAMES COOK.

This paper does not tend to prove a legal title in the plaintiff, and should have been rejected for the following reasons, namely:

1st. Because it is not under seal, and expresses no consideration.

2d. Because it does not contain words of grant or conveyance.

3d. Because the property is not described or identified as the property in suit.

4th. Because it purports to be the act of only one of the locators.

Exhibit A is in the following words and figures, namely:

COOK & PAYNE,
TO
A. KENNEDY & CO.
} **Mining Deed.**

Virginia City, Sept. 20, 1859.

This is to certify, that we, D. B. Cook, J. Cook, and E. Payne, have this day sold, bargained, and convey——all our rights to the and interest in a certain set of mining claims to A. Kennedy & Co.; said claims being situated as follows: Lying and being in the Virginia District, north of the Comstock claims, and situated on the Comstock and Penrod vein; for and in consideration of which A. Kennedy & Co. agree to prospect the same thoroughly, and when pay-dirt is struck, then Cook, Payne & Co. agree to pay one-half of the expense, and come in equal partners to the same. Kennedy & Co. receiving one undivided half of six hundred feet.

D. B. Cook,
James Cook,
E. Payne.

This paper does not tend to prove a legal title in the plaintiff, and should have been rejected for the following reasons, namely:

1st. Because it is not under seal.

2d. Because the property is not described with sufficient certainty. Indeed, it is not described at all. What is the extent of the property, and how far north of the Comstock claim, does not appear. The identity of this, and the property in suit, is not established.

3d. Because Exhibit "A," if a conveyance at all, is defeasible, and not absolute by reason of the conditions that the grantees shall "prospect thoroughly," and, upon striking "pay-dirt," allow the grantors to come in as equal partners on paying "one-half of the expense." This paper is a contract concerning land, rather than a conveyance thereof. If the grantees did not "prospect thoroughly," there would be a forfeiture, and the right or title would return to the grantors. If they did "prospect thoroughly" and "strike pay-dirt," then one-half of the right or title would return to the grantors upon their paying one-half of the expense of prospecting. If the grantees should "prospect thoroughly," and fail to "strike pay-dirt," then the right of the grantees, perhaps, would become absolute. This paper, instead of being a convey-

ance, seems to contemplate a conveyance at some future time, when the rights of the parties have been absolutely adjusted by the results of the action contracted for.

The Mining Rules of the Gold Hill District should not have been admitted as evidence touching the regularity of the location, because they were subsequent thereto in point of time.

Finally: If the special finding be defective, ambiguous, or uncertain, the judgment should be reversed, and a *venire de novo* awarded.

Brown & Sons v. Ferguson, 4 Leigh, 37;
Kinney v. Beverly, 2 Hen. & Munf., 328;
Clay v. White, 1 Munf., 102;
Barnes v. Williams, 11 Wheat., 415;
McArthur v. Porter, 1 Peters, 626;
Prentice v. Zane's Adm'r., 8 How., 470;
Ches. Ins. Co. v. Stark, 6 Cranch, 268;
Bellows v. President, etc., 2 Mason C. C. R., 42;
Garfield v. K. F. M. Co., 17 Cal., 513;
Breeze v. Doyle, 19 Cal., 105.

If the special finding omits any essential to the plaintiff's right of recovery, the judgment should be set aside, and judgment entered for the defendant.

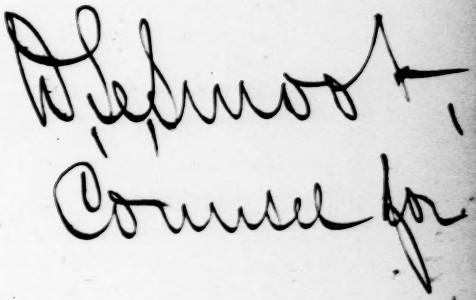
Jones v. Jones, 7 Term Rep., 48;
Kinney v. Beverly, 2 Hen. & Munf., 328;
Graham v. Bayne, 18 How., 63;
Taylor v. Hill, 2d ed. 10 Leigh, 486, and the cases cited above.

If the ruling of the Court at the close of the plaintiff's testimony was erroneous, the judgment should be set aside, and a judgment entered for the defendant, or the Court below should be directed so to do.

If the rulings of the Court as to Exhibits "A" and "C" and the Mining Rules were erroneous, then the judgment should be set aside and a *venire de novo* awarded, because there is nothing in the record to show that such errors were not prejudicial to the defendant.

D. L. SMOOT,
Counsel for Appellant.

SAN FRANCISCO, Cal., Oct. 7, 1878.



No.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE UNION CONSOLIDATED SILVER MINING COMPANY,

Plaintiff in Error,

vs.

JAMES D. TAYLOR,

Defendant in Error.

Brief for Plaintiff in Error.

HARRY I. THORNTON,
Of Counsel for Plaintiff in Error.

C. A. Murdock & Co., Book and Job Printers, 532 Clay Street, San Francisco.

IN THE

Supreme Court of the United States.

THE UNION CONSOLIDATED SILVER MINING COMPANY,
Plaintiff in Error,

vs.

JAMES D. TAYLOR,
Defendant in Error.

I.

We cannot agree with counsel for defendant in error that special findings of fact by the Court differ essentially in form, or in requisites they shall possess from special findings of fact by a jury. They are necessarily alike, and section 649 of the Revised Statutes declares that they shall have the same effect.

When in an action at law in the Circuit Court a jury is waived and special findings of fact are

made by the Court and a judgment rendered, the losing party may bring the case, by writ of error, to this Court, and, without any exception taken or objection made in the Court below, raise the question here, whether the findings are sufficient to support the judgment.

If, during the trial in the Circuit Court. errors of law were committed, they could only be considered in this Court if excepted to at the time and properly embodied in bills of exception.

This is the simple practice, and has been strictly followed in this case.

It is prescribed by sections 649 and 700 of the Revised Statutes.

Tyng v. *Grinnell*, Collector, (2 Otto, 467).

This practice is not affected by section 974 of the Revised Statutes, providing that the practice in the Circuit Court shall conform as near as may be to the practice in the State Courts, and section 1669 of the Compiled Laws of Nevada, providing that exceptions to a defective finding of the Court shall be filed within five days after the making of the finding, or be considered waived.

In the case of *Clement* v. *The Phœnix Insurance Company*, 7 Blatchford, 57–8, Judge Blatchford, in a case where a jury was waived and special findings requested, refused to make them, and says: "A winning party may be seriously prejudiced "by a special finding, because, on a review by "the Supreme Court thereon, if any one fact, "however slight, really necessary to support the

" judgment, should merely through inadvertence " or accident, have been omitted from the find- " ing. judgment would have to be reversed."

Citing *Graham* v. *Payne*, 18 How. 60, 63, in which case the Court says: " The Circuit Court " may adopt the forms of pleading and practice " of the State Courts, but no state legislation " can be applied to the practice of this Court " and the mode in which causes shall be brought " into it for review. The 11th section of the " Practice Act of Illinois (March 3, 1845), permits " matters both of fact and law to be tried by the " Court, if both parties agree. Counsel may " agree, as in this case, to submit both fact and " law to the decision of the Court; but they can- " not by agreement, introduce a new practice " into this Court, or compel us to adopt the pro- " visions of the 22d Section of the same Act, as " to the mode in which such cases shall be re- " viewed in error. The practice of this Court " is regulated by the common law and acts of " Congress."

Article seventh of the Amendments to the Constitution, and section 700 of the Revised Statutes provide that the review of a special finding may extend to the determination of the sufficiency of the facts found to support the judgment, and that the procedure shall be according to the common law.

Under section 914 of the Revised Statutes. providing that the practice in the Circuit Court

shall conform as near as may be to the practice in the State Courts, it was not intended that after special findings were filed by the Court below, there should be any qualification or abridgment by the State Code of the right to have this Court pass upon the sufficiency of the facts to support the judgment according to the established common law practice.

No provision of a code of a State or decisions thereunder, can deny to this Court the right to review the sufficiency of the special findings because objection was not made in the Court below.

The cases of the *Railroad Co.* v. *Lindsay*, 4 Wallace, 656, and *Walker* v. *Sandient*, 2 Otto, 90, do not go to this extent.

II.

The judgment in favor of Taylor is for an undivided five feet of the mining claim on the Comstock lode, commencing at a point 1500 feet north of the south boundary line of the Ophir claim and running thence northerly 300 feet.

To support this judgment, counsel for Taylor contend that "the conveyance to Taylor was not "an undivided interest in the six hundred feet, "but in the three hundred which was in dis- "pute." (Brief, p. 26, line 3 *et seq.*)

We assert that this is not shown in the record.

The conveyance to Taylor *in hæc verba* is not in the Transcript, and if it was, could not be con-

sidered by this Court, unless it was in the findings.

On this point the findings are:

That Payne & Cook located on the 10th day of June A.D. 1859, and took possession of a claim known as the Union Claim, beginning at a point 1500 feet north of the south line of the Ophir Claim and extending thence northward 600 feet, and embracing the ground in dispute, and on the 7th day of September A.D. 1860, sold and conveyed the claim to Kennedy, McFadden, Maloy and Newman, who took possession of it and worked *thereon*, and with their successors continued in possession *thereof* until the conveyance to Taylor;

That during 1860, '61, '62, '63 and '64 the original locators of the Union Claim and others deriving title from them, including Wood, the immediate grantor of Taylor, and Taylor himself expended over $30,000 in prospecting and developing *said claim;*

That on the 11th day of October Wood was the owner of at least an undivided 50 feet of the said "*Union Claim*," deriving his title thereto regularly from the original locators, Payne & Cook, and on that day sold and conveyed by deed to the plaintiff, Taylor, an undivided five feet of *said* "*Union Claim.*" (Findings 1st, 2d and 3d.)

Findings 5th and 6th state, that undivided portions of the whole claim of 600 feet of said "Union Claim" were conveyed to the Union

Gold and Silver Mining Company, and by it to the Union Consolidated Silver Mining Company.

So far it is as clear and positive as language can make it that the claim located and possessed was 600 feet in length, running north from a point 1500 feet north of the south line of the Ophir Claim; that said claim was called the "*Union Claim;*" that the successors of the locators, and among them, Wood, the grantor of Taylor, were in possession of, and worked, and expended money on the whole 600 feet of said claim during the years 1860, '61, '62, '63 and '64; that Wood owned an undivided 50 feet of *said* Union Claim of 600 feet; and on the 11th day of October, A. D. 1862, sold and conveyed by deed to Taylor, an undivided five feet of *said Union Claim*, of 600 feet, and that Taylor himself went into possession, under said conveyance, and in 1862–3, together with others, successors of the locators, expended over $30,000 in prospecting and developing said claim—the said Union Claim of 600 feet.

In finding 9th, the Court says: "That neither "the original locators of the Union Claim, nor "their successors in interest, ever had an undis- "puted title to more than 300 feet of the 600 "feet located, and that that 300 feet lies next to "the claim of the Ophir Company."

This does not deny location, possession and conveyances of the 600 feet, but merely says the title was undisputed to only 300 feet lying next to the Ophir Claim.

Finding 8th is: "That the interest sold and "conveyed by the aforesaid Solomon Wood, to "the plaintiff is described as follows: five feet "undivided interest in the claims of the Union "Company, located upon the Comstock Silver "Lead; said claims consist of 300 feet, bounded "north by the claims of the Sierra Nevada Sil-"ver Mining Company, and on the south by the "claims of the Ophir Silver Mining Company."

If this finding means that the interest conveyed by Wood to Taylor is described in the conveyance as 5 feet of the Union Claim, the said claim being 300 feet, &c., it is directly in conflict with finding 3d, which says that on the 11th day of October A.D. 1862, Wood sold and conveyed to Taylor 5 feet of "said Union Claim," and finding 1st, which says that the said "Union Claim" is 600 feet and includes the ground in dispute.

And if this finding means that the interest conveyed by Wood to Taylor is described in the conveyance as 5 feet of the Union Claim, the said claim being 300 feet, &c., this part of the conveyance namely, the claim being 300 feet, is *falsa demonstratio*, and the grantee takes 5 feet of the Union Claim, which is found to be 600 feet.

If this finding means that the interest conveyed to Taylor is described in the conveyance as five feet undivided of the claims of the Union Co., and that the Court *now*, on this trial, finds

and holds upon the evidence, (the title to 300 feet being disputed), that said Union claims consist of 300 feet only; then, according to such finding and decision, the loss of the 300 feet should be borne by *all* the claimants, and the judgment should have been for 2½ feet of the remaining 300.

That this finding is not really of the terms and words of the deed, is apparent from the anachronism it contains. It says the deed conveys 5 feet in the claims of the *Union Company*, while it was made in October, 1862, and then the claim was, and had been held, by individual tenants in common, and the first appearance on the scene of any company was in September, 1863, when the Union Gold and Silver Mining Company became an owner, as shown by finding 5th and the preceding findings.

The matter stands thus: The Union Claim was located and held as 600 feet; the successive owners and grantors of Taylor held their interests in the 600 feet, and Taylor took and held his five feet in 600 feet; and the successive owners and grantors of defendant held their interests in 600 feet, and defendant took and held its interest in 600 feet; but 300 feet of the claim was not held by an undisputed title; and the Court below finds the title to the north 300 feet bad, and holds that the south 300 feet, next to the Ophir, is all of the claim, and that Taylor should recover from the defendant five feet out of this 300 feet.

This, we contend, is clearly erroneous.

Do not counsel for Taylor admit this?

They say: "If the parties acted upon the "assumption that there were 600 feet in the mine "and Taylor and his grantor acted upon that "assumption at the time of the conveyance and "it afterwards turned out that there were but 300 "feet, it might be that his interest should be "proportionately reduced." (Brief, p. 26, line 7 *et seq.*)

True, they claim that the conveyance to Taylor was of 5 feet in 300, but we have shown that this is not the finding.

And the case is stronger for us than the one stated by counsel on which they base their admission that Taylor might be proportionately reduced. Because not only did Taylor and his grantor act upon the assumption that there were 600 feet in the claim but defendant and its grantor and all preceding owners in the claim acted upon that assumption, and as tenants in common if they lose the north 300 feet of the claim by this finding Number 8 they should all lose proportionately.

Again this finding 8th is insufficient and makes uncertainty and confusion in this that it does not fix the locality of the 300 feet of which the Union Claims consist. In the complaint, in findings 1st and 11th, and in the judgment the south line of the Union is said to be at a point 1500 feet north of the South line of the Ophir. This

in itself suggests and implies an uncertainty as to the north line of the Ophir, but in finding 8th the claim of 300 feet found to be held by the tenants in common by valid title is described as bounded north by the claims of the Sierra Nevada Company and on the south by the claims of the Ophir Company.

There is no finding that the claims bounded on the south by the claims of the Ophir Company have the same south boundary with claims commencing at the south at a point 1500 *feet north of the south line of the Ophir claims.*

There is no finding that the 300 feet described as bounded on the south by the Ophir in finding 8th, is the same ground as the south 300 of a claim of 600 feet beginning at a point 1500 feet north of the south line of the Ophir.

There is no finding that the 300 feet bounded on the north by the Sierra Nevada Claim and on the south by the Ophir Claim, is any part of the ground beginning at a point 1500 feet north of the south line of the Ophir and extending 600 feet north, and known as the Union Claim. Both the Sierra Nevada Claim and the Ophir Claim may be between a point at the south line of the Ophir Claim and a point 1500 feet north of it.

Out of this chaos there must be a *venire de novo.*

III.

We will discuss the position of our opponents upon the question of Abandonment.

These facts are found by the Court:

That on the 10th day of June A.D. 1859, Payne and Cook located and took possession of the mining claim called in the findings the "Union Claim," for an undivided portion of which this suit is brought;

That on the 11th day of October A.D. 1862, Solomon Wood, owning an undivided fifty feet of the claim, and deriving his title thereto from the original locators, sold and conveyed by deed, an undivided five feet thereof to the plaintiff, Taylor;

That on the 30th day of September A.D. 1863, certain parties, who derived title from the original locators, sold and conveyed all their interest in the said Union Claim to the Union Gold and Silver Mining Company, a corporation of California;

That on the 27th day of May A.D. 1874, said corporation sold and conveyed all its interest in said Union Claim to defendant. the Union Consolidated Silver Mining Company, a corporation of California;

That the defendant and its grantors have been in possession of the ground in dispute for more than two years before the commencement of this action; (Finding 7th, Transcript, page 7.)

That at the time plaintiff began this suit and for more than five months before that time, the defendant was and ever since has been in possession of the Union Claim; (Finding 11th, ibid. p. 7.)

That the defendant was in the exclusive adverse possession of the premises in dispute before the commencement of this suit and had ousted plaintiff therefrom; (Finding 12th, ibid. pp. 7, 8.)

That during 1860, '61, '62, '63 and '64 the original locators and others deriving title from them, including Wood and plaintiff, worked the Union Claim;

"That since the year 1863 the plaintiff has not "done any work personally on the said claim, "nor has any been done for him, except so far as "the work done by his co-tenants can be consid-"ered work, done for him": (Finding 4th, ibid. p. 7.)

"That plaintiff and defendant are tenants in "common of the mining claim described in the "complaint." (Finding 13th, ibid. p. 8.)

Premising that this suit was commenced in June 1875, that the period of the Statute of Limitation for mining claims in Nevada is two years, and that the Union mining claim was upon public land of the United States, we will proceed to consider the doctrine of abandonment, and after fixing its principles, apply them to the foregoing facts found by the Court, and to the refutation

of the arguments made by counsel on the other side.

We will resort to fundamental principles, to common sense, to considerations of public policy and public convenience, to the demands and necessities of mining enterprise, to the dictates of justice, the axioms of ethics, the analogies of the law and its recorded precedents embodying the wisdom of great judges wherever they sat in judgment.

Blackstone says:

"Property, both in lands and moveables, "being thus originally acquired by the first taker, "which taking amounts to a declaration that he "intends to appropriate the thing to his own use, "it remains in him by the principles of universal "law, till such time as he does some other act "which shows an intention to abandon it; for then "it becomes, naturally speaking, *publica juris* once "more, and is liable to be again appropriated by "the next occupant. So if one is possessed of a "jewel, and casts it into the sea, or a public high-"way, this is such an express dereliction, that a "property will be vested in the first fortunate "finder that will seize it to his own use."

See Wendell's Blackstone, v. 2, p. 9.

And again: "A right acquired by prescription "may be lost by abandonment or non-user. "After twenty years of non-user the Court would "generally presume that the right had been re-

" leased, and abandonment may be inferred, from " unequivocal acts, within a much shorter time, " as by pulling down a wall on which was an " ancient light and erecting a blank wall in its " place."

2 Wend. Bl. p. 264, note and authorities cited.

Kent, vol. 3, p. 450, gives the rule and its reason. Speaking of the right to light and air, which like the public domain, while the title remains in the Government, belong to the occupant, he says " the right is acquired by mere occupancy, and " will continue so long only as the party continues " the enjoyment, or shows an *intention* to con- " tinue it.

" It is the modern doctrine that the ceasing to " enjoy such an easement, acquired by occupancy, " will destroy the right, provided the discontin- " uance is absolute and decisive and unaccompa- " nied with any intention to resume it *within a* " *reasonable time;* and it is a *wholesome and wise qual-* " *ification* of the rule considering the extensive and " rapid improvements that are everywhere " making upon real property." The very sources whence Kent derived this enunciation are the sources, and the only sources whence our courts derived their law of abandonment of claims to the public lands. Because, and only because this was the common law, they were enabled to declare it, and apply it to possessory rights. Why seek to apply it without its qualifications? Surely not on the maxim *cessante ratione.* For who will say

it is not here as it was in England as to mines, as to light, air and water, a wholesome and wise qualification to insist upon an intention to resume work within a *reasonable* time — not to allow *unreasonable* delay — considering the extensive and rapid exploration, prospecting and development that is everywhere and all around us, bringing to light and into use the hidden wealth of the mines? But as this is no novel, so it is no obsolete or antiquated or inapplicable doctrine; we find it applied to public land claims in Kentucky and New York, by such jurists as Marshall and Bronson. Bearing in mind that in New York the Statute of Limitations was twenty years against ours of two, and that consequently the lapse of two years has here the same bearing on all questions of prescription and abandonment as twenty years had there, let us see what Judge Bronson said of a case very like this:

"If the occupant abandons the possession, or "what is the same thing, suffers it to pass into "the hands of a stranger, without any effort, "within a *reasonable* time to regain it, or any ex- "cuse for the omission, the original presumption "in favor of his title, must give place to another "presumption in favor of a better right in the "new occupant;" and, in applying this rule to the facts before him, he thus characterizes the conduct of the party he convicted of abandonment: "He allowed the adverse possession to "continue for thirteen years without any attempt "to regain the enjoyment. He *intended* to assert

" his claim to the property himself but put it off " from year to year. He *supposed* his title was " good, but he thought it would cost as much as " it was worth to get it. Taking the whole of his " testimony together, it is evident that he never " had any *settled* purpose of attempting to *regain* " *the possession.*"

Whitney v. *Wright*, 15 Wendell, 177.

In *Meyer* v. *McMillan*, 4 Dana, 488, Judge Marshall says: "The continuance or abandonment " of the party's *claim* is not equivalent to a con- " tinuance or abandonment of his actual posses- " sion. It is not the mere *secret* intention of " returning, or the mere secret intention of *holding* " *on to a claim of right*, unaccompanied by any open " act *manifesting* that intention that is to control " the obvious purport and palpable effect of openly " relinquishing the actual occupancy and enjoy- " ment of the land. Much less can these demon- " strations of intention be overcome by a *mere* " *assertion of a claim at a distance from the land*, after " the occupancy has been relinquished, when there " is neither any actual enjoyment, permanent or " periodical, of the *appropriate uses of the land*, nor " any indication upon the land itself of any inten- " tion *so* to enjoy it, or of any present claim of " proprietorship or possession. The *animus rever-* " *tendi* which can qualify the effect of a present " relinquishment of the *use*, and an open depart- " ure from the land, must itself be indicated by " *open* and *unequivocal* facts, connected with the

" manner and purpose of the departure, and the
" condition in which the tenement is left. The
" real question is whether the plaintiff was actu-
" ally possessed of the land at the time of de-
" fendant's entry. If he had previously aban-
" doned the possession, he had no right to enter
" upon defendant, merely because he had *once*
" *been in possession* and still *claimed* the land."

And in *Basey* v. *Gallagher*, 20 Wallace, Justice Field, delivering the opinion of the Court, says:

" In the case of *Tartar* v. *The Spring Creek Water*
" *and Mining Company*, decided in 1855, the Su-
" preme Court of California said: 'The current
" of decisions of this Court go to establish that
" the policy of this State as derived from her leg-
" islation, is to permit settlers in all capacities to
" occupy the public lands, and by such occupa-
" tion to acquire the right of undisturbed enjoy-
" ment against all the world but the true owner.
" In evidence of this, acts have been passed to
" protect the possession of agricultural lands ac-
" quired by mere occupancy; to license miners;
" to provide for the recovery of mining claims;
" recognizing canals and ditches which were
" known to divert the water of streams from
" their natural channels for mining purposes; and
" others of like character. This policy has been
" extended equally to all pursuits, and no par-
" tiality for one over another has been evinced,
" except in the single case where the rights of
" the agriculturalist are made to yield to those of

" the miner, where gold is discovered in his land.'

" The policy of the exception is obvious. With " it the entire gold region might have been in- " closed in large tracts, under the pretence of ag- " riculture and grazing, and eventually what " would have sufficed as a rich bounty to " many thousands, would be reduced to the pro- " prietorship of a few. Aside from this, the " legislation and decision have been uniform in " awarding the right of peaceable enjoyment to " the first occupant, either of the land, or of any " thing incident to the canal.

" Ever since that decision, it has been held " generally throughout the Pacific States and " Territories, that the right to water by prior ap- " propriation for any beneficial purpose, is en- " titled to protection.

" Water is diverted to propel machinery in " flour-mills and saw-mills, and to irrigate land " for cultivation, as well as to enable miners to " work their mining claims; and in all such cases " the right of the first appropriator, exercised " within reasonable limits, is respected and en- " forced.

" We say within reasonable limits, for this right " to water, like the right by prior occupancy to " mining ground or agricultural land, is not unre- " stricted. It must be exercised with reference to " the general condition of the country, and the " necessities of the people, and not so as to deprive " a whole neighborhood or community of its use

"and vest an absolute monopoly in a single indi-
"vidual."

There is a California opinion which we think recognizes the same doctrine, that the *intention* spoken of as the criterion of abandonment, is not a secret intention, but that which is manifested; and Judge Rhodes expressly puts it on the maxim that every man is *conclusively* presumed to *intend* the natural and probable consequences of his own *acts* and *omissions*.

Davis v. *Perley*, 30 Cal. 636.

Against this *conclusive* presumption, secret, unexecuted, abstract thoughts, desires, wishes and sentiments can weigh nothing; but those who "reasonably" act upon these appearances, are entitled to say that as against the party inducing such reasonable belief and consequent action, the appearance must stand for the reality. That if his acts and omissions were, in the language of Judge Rhodes, the *natural and probable* antecedents of an abandonment, the presumption of the consequent intention not to return is a conclusive one, and those who *reasonably*, *fairly* and *honestly* construing such acts and omissions, act upon their natural and probable consequence, are not to suffer for so doing; but rather he who induced such *reasonable belief*. And this, too, is in perfect accord with the common law.

The leading case is *Moore* v. *Ransom*, 3 Barn. & Cress. 332, where Bayley, J., first expressed the doctrine we have quoted from Kent. The cita-

tion in Kent is almost taken from this case; but Bayley gives the reasons more at length; substantially, that as the right is acquired by enjoyment, it must be continued by enjoyment, or by the *outward manifestation* of an intention to continue it; when the party ceases to enjoy in the *same way he acquired*, the right ceases; that it would be *unjust* to allow him, after having *apparently* relinquished the right to resume it to the prejudice of those *thus* induced to alter their condition; that "it is a wholesome and wise qualifica- "tion of the rule to say that the ceasing to enjoy "destroys the right, unless when the party dis- "continues the enjoyment he does some *act* to "show that he means to resume it within a *reason-* "*able time.*" And Gale & Whatley, (Treatise on Easements, p. 262), commenting on this case and *approving* it, say: "It appears that the "law has fixed no precise time during which this "cessation of enjoyment must continue — the "material inquiry is, whether there was the *inten-* "*tion* to renounce the right," showing that the rule and its qualifications always co-existed.

In *Stockal* v. *Singers*, 8 Ellis & Blackburn, 31, this question was much discussed. The Judge who tried the case left it to the jury to say whether the right had been acquired in the first instance. He then told the jury that, assuming the right had once existed, the question would arise whether it had ceased. He said the right might be lost by abandonment, and that closing the windows with the intention of never opening

them again, would be an abandonment destroying the right; but that closing them for a mere temporary purpose would not be so. He also stated that, though the person entitled to the light, might not *really* have abandoned his right; yet, if he *manifested* such an *appearance* of having abandoned it as to induce the owner of the adjoining land to alter his position in the *reasonable belief* that the light was abandoned, there would be a preclusion as against him from claiming the right. He also told them in general terms, that unless the closing was with the intention of abandoning forever and for aye, the right was not gone; that is, he gave both the rule and the qualifications and limitations of it. On error, this whole ruling was affirmed as correct, by all the Judges. It was also said, during the argument, that what was a "reasonable time," was a question of fact for the jury.

In the note to this case the editor says: "It "is scarcely open to question that where the "party clearly relinquishes the enjoyment *it lies* "*with him* to show an intention to resume the "*use of it* within a reasonable time."

Stockal v. *Singers*. was expressly approved as late as 1866, in *Crossly* v. *Lightower*, L. R. 3 Eq. 291. That case involved the question of a water right, and every word in the opinion is as applicable to this case as if it had been written for it. We extract only portions of it. After stating the general rule that abandonment is a question of intention, it is said that the instructions above

quoted in *Stockal* v. *Singers* were right and proper. The opinion proceeds: "It has been always held "to be of considerable importance, that a person "in possession of a certain right, and leaving the "right wholly unused for a long period of time, "and having so far given an encouragement to "others to lay out their money, on the assump- "tion of that right not being used, should not "be allowed at any period of time to resume "his former right, to the damage and injury of "those who themselves have acquired a right of "user, which the recurrence to this long disused "easement will interfere with. How unjust it "would be in a case like the present, if a per- "son might say—as counsel have said—'I may "lie by any number of years I please, and then I "may resume the works in question.' It appears "to me if that were allowed, no man would be "safe on any river [we say mine] in the king- "dom." It goes on to show that if the right may be resumed after one lapse of time, it may forever, and concludes that it must *be taken* to be within the knowledge of the prior occupant that other persons are spending their capital, while he is lying by supinely.

That *unreasonable* delay is evidence of abandonment, see *Fuentes* v. *U. S.*, 22 How. (U. S.) 460 —Abandonment may be inferred from disuse and cessation of occupancy.

Glucknap v. *Reed*, 22 Cal. 468.

Every analogy in the law sustains these direct

adjudications. In cases involving the question of fixture — whether the proprietor of a chattel has lost his right, or changed its nature by affixing it to the realty, the books are all agreed that the question is one of *intention*. We propose to show that everywhere throughout the law, it is not the secret but the manifested intention upon which the public is expected to rely and act, and that the purpose of the claimant recognized by law, is a fixed, settled, provable purpose, not a vague, floating or secret one, and that even properly manifested volition can never keep alive a right, the exercise of which is intended to be resumed, unless it also appear that the interruption was temporary in its nature, and the intention was and appeared to be to resume within a *reasonable* time.

As to fixtures, we quote as a sample: "The "*secret*, unexecuted intention has no legitimate "bearing. It is immaterial what purpose is "formed, so long as it is not carried out. Pur- "chasers have a right to *infer* and *act upon the* "*inference*. The destination which gives to mov- "able objects an immovable character, results "from *facts* and *circumstances* determined by the "law itself, and can neither be established nor "taken away by the secret unexecuted purpose "or intention of the owner. *Snedicker* v. *Waring*, "2 Kernan, 170;" *Wadleigh* v. *Jauvrcio*, 41 New Hampshire, 512; *S. P. Yate* v. *Blackburn*, 48 Mississippi, 1. So although a tenant may annex his chattel to the realty, without losing his right to

it, provided he intends not to make it part of the realty, he must remove it within a *reasonable* time. Taylor L. and T. § 552, *Ellis* v. *Page*, 1 Pick. 18 and note. So "domicile" depends exclusively on intention, but "an intention to re-"turn at a *remote* or *indefinite* period, to the "former place of actual residence, will not "control, etc." *Hallett* v. *Bassett*, 100 Massachusetts, 170. So a *floating* intention, it is said, will not answer, *Anderson* v. *Anderson*, 42. Vt. 350. Even though the party's absence from the State is only temporary, yet if the time of his proposed return is *indefinite*, he retains no domicile in the State. *Sleeper* v. *Page*, 15 Gray, 350. Where the *outward indicia* of inhabitancy point to A as place of residence, the fact that at the time of removal from B to A, the party declared his intention to be to remain at A only temporarily, and to return to and retain his habitancy in B, cannot enable him to retain his former domicile. *Holmes* v. *Greene*, 7 Gray, 300. One who left Kansas, and went to Pennsylvania on business, and resided and kept house there with his family two years—held to have become a resident of Pennsylvania, though he intended to and did return to Kansas. *Graham* v. *Trimmer*, 6 Kansas, 230. Domicile, like abandonment, is a question of fact and intention; but merely speaking of a place as a home, without any act showing an intention to return to it, amounts to nothing. *Pennsylvania* v. *Ravavel*, 21 How., U. S. 110.

Again, "the vital principle of dedication is the

" intention to dedicate, the *animus dedicandi*.
" Here we have, throughout the books, the *general*
" rule in dedication cases. Now for the *qualifica-*
" *tions*:

" It is a general rule, that to constitute a valid
" common law dedication, there must be an in-
" tention to dedicate, and an act on the part of
" the owner, and an acceptance on the part of the
" public. The *general* rule is, however, subject to
" this modification, that if the owner of a servient
" estate, intentionally, or by gross negligence,
" leads the public to believe that he has dedi-
" cated the premises to public use, he will be es-
" stopped from denying the dedication to the
" prejudice of those whom he may have misled.
" Herman on Estoppel, Sec. 521; *Wilder* v. *City*
" *of St. Paul*, 12 Minn., 192, and cases cited.

" We think that the question, whether a per-
" son intends to make a dedication of ground to
" the public for a street or other purpose, must
" be determined from his acts and statements ex-
" planatory thereof, in connection with all the
" circumstances that surround and throw light
" upon the subject, and not from *what he may sub-*
" *sequently testify as to his real intention* in relation
" to the matter. And this is on the principle
" that the public have the right to suppose that a
" man *intends what his outward conduct* and state-
" ments indicate, *inasmuch as they cannot discover*
" *his intention in any other manner*. Men, in all
" the affairs of life, are presumed to intend what
" is *fairly* and clearly indicated by their acts and

" conduct; and where the rights of the public or " *third parties* are concerned, *they have* a right to " act upon such presumption."

City of Columbus v. *Hahn*, 36 Indiana, 337.

"Dedication is *in the nature* of an estoppel *in* " *pais*. The rule as to dedication at common law " is but the application of the doctrine of estop- " pel *in pais*."

Herman on Estoppel, Sec. 518.

"This principle of estoppel *in pais*, is applied " in the case of a dedication of the use of one's " land to the public, when private and individual " rights have been acquired in reference to it."

Ib. sec 519.

Other cases call it a *quasi* estoppel, but *all* admit, almost in the language of some of our instructions, that where third parties have acted on a *reasonable* belief, induced by the acts of the former owner, these are facts from which the jury are authorized to infer the intention which constitutes dedication.

See *Hughes* v. *Providence*, 2 R. I. 493;

Mayor v. *Franklin*, 12 Georgia, 239,

and *Cincinnati* v. *White*, 6 Peters, 431, where the Supreme Court of the United States say it is in the nature of an estoppel where private and individual rights have been acquired with reference to it, and quote approvingly the language of Lord Ellenborough, that, "if the owner of the soil " throws open a passage, and neither marks by " any *visible* distinction that he means to preserve

" all his rights over it, nor excludes persons from " passing through it by any *positive* prohibition, " he shall be *presumed* to have dedicated it to the " public." *Noyes* v. *Ward*, 19 Conn. 250, is to the same effect. So is *Cleveland* v. *Cleveland*, 12 Wend. 172, the language of which is very pertinent, " that any other construction would convert " the situation into a claptrap to catch subsequent " purchasers,"—we say to catch subsequent appropriators. "The law of dedication may be said " to rest, in part, at least, upon the doctrine of " estoppel *in pais*."

Bigelow on Estoppel, 559.

" Dedication has been often said to be a case of " estoppel *in pais*."

Vol. 2, p. 2, Gr. Ev. § 662.

Holdane v. *Cold Spring*, 21 N. Y. 474–479;

Child v. *Chappell*, 5 Selden, 246, and cases cited;

3 Kent's Com., 451, 12th edition.

" It is in the nature of an estoppel *in pais*."

Washburn Real Property, Book 3, ch. 2, § 6, p. 70 top, 460 margin, 456 bottom, vol. 3, 3d edition.

" Dedication is by the act of the owner, and " depends on his *intention as expressed*. But lay- " ing out land in lots and streets, clearly marked " as such, and selling lots as bounded on such " streets, without any qualification, must, both

" upon principle and authority, be held as a ded-
" ication to the public as streets.

"*An intention to qualify the dedication concealed* " *within the breast of the owner*, or not expressed in " some way on the map or in the conveyance, " which are the evidence of and constitute the " dedication, *cannot be regarded.*"

Pope v. *Union*, 18 New Jersey Equity Reports, 284;
Rees v. *Chicago*, 38 Illinois, 339.

Dedication, like abandonment, is a mixed question of law and fact, and it is proper for the Judge to charge the jury that certain facts, if found, will authorize the inference of the intention to dedicate or abandon.

Waugh v. *Luch*, 28 Ill., 488;
Cluggage v. *Duncan*, 1 Serg. & Rawl., 120;
Brentlinger v. *Hutchinson*, 5 Watts, 13.

In *Grand Survey Canal Co.* v. *Hall*, 1 Manning & Granger, 392, Lord Denman instructed the jury by reading the above quoted summing up of Lord Ellenborough, and then telling them, " that " supposing the bridge in question to have been " originally built as a carriage-way for the exclu-
" sive accommodation of the tenants of the Rolls'
" estate; still, if *in consequence of the acts* of the al-
" leged dedicators, *an idea grew up in the minds of* " *the public*, that they intended to dedicate the
" bridge to the public use, such acts would amount
" to a dedication." This being assigned as error,

the Court above held, that the case was properly left to the jury; that the language of the Judge was not inconsistent with his assuming that the jury were to take the intention into consideration; that it amounted to telling them that they were warranted in coming to the conclusion that there was a dedication.

So Angell says, it is not an indispensable condition of dedication, that others have incurred expense, etc. "Such facts are strong, perhaps "almost conclusive, evidence of dedication;" but the most the Court can say is "that these are "facts from which the jury are authorized to "infer the intention, etc." But we are by no means driven here to contend for an estoppel *in pais*. It matters not to us, whether it is called estoppel, *quasi* estoppel, in the nature of an estoppel, or dedication. The analogy of these dedication cases to *Stockal* v. *Singers*, is equally perfect, and we have shown that, throughout, the question is not as to abstract secret intention, but that to protect the rights of third parties, the law entitles them to rely upon reasonable inferences from appearances—to accept the appearance for the reality—in the language of Judge Rhodes, to conclusively presume that the party intended what are considered the natural and probable consequences of his conduct. That as Angell says, Sec. 156, the idea of estoppel *in pais*, furnishes analogies for our guidance in presuming the intention.

Angell on Highways, Sec. 142.

We find the same analogies in the homestead cases. As by the act of the claimant, the land may be impressed with that character, so by his act it may be abandoned as such. "The intention "must be to *reoccupy as a homestead.* [We say here "to *repossess as a mine.*] Occupancy of premises "by the husband with his family, is presumptive "evidence of appropriation as a homestead. Re- "moval is in like manner presumptive evidence "of abandonment;" and the party removing must rebut.

Harper v. *Forbes*, 15 Cal. 203.

And proof of a *vague* or *secret intention* to re-reside, will not suffice to rebut this presumption. And exactly the same rule as that laid down in *Stockal* v. *Singers*, holds in homestead cases, where third persons have changed their position or expended money, or acted so that a resumption of the homestead claim would injure them, and for the same reasons of policy and justice.

Re. Phelan's estate, 16 Wise, 76;
Titman v. *Moore*, 43 Ill. 175;
Cabeen v. *Mulligan*, 37 Ill. 230;
Fyffe v. *Beers*, 18 Iowa, 4;
Davis v. *Kelly*, 14 Iowa, 523.

The reasons why the doctrine of abandonment is found in the law, are thus apparent. They are because the subject matter is *publici juris* in the first instance—belonging *in fee* to no one, but open to the *use* of all. That as an

exclusive right to it can be acquired only by use, it should continue no longer than the use continues, or if interrupted, is only temporarily interrupted in contemplation of resumption within a reasonable time? Why within reasonable time? Simply because the rule originated mainly with a view to afford a just protection to the rights of *all*, in subjects in which *all* have a common interest—to prevent that which can be put to use from being monopolized and rendered useless, to facilitate developement and encourage improvement. Obviously the more hazardous and uncertain the enterprise, the greater the disproportion in value between the thing undeveloped and in disuse, and the same thing developed and productive, the greater the necessity for the protection of those who risk their labor and means in acquiring and proving it. Thus in the case of a mine, "the injury caused to third parties," by the resumption of a relinquished possession, is apt to be greater than in the case of a farm. And for this deduction, that the rule of restriction to a reasonable time and the other *qualifications* of the general rule of abandonment apply *a fortiori* to miners, we have express warrant. Though as a *general* rule when specific performance is sought, Courts of Equity may not be inclined to regard time as of the essence of a contract, yet "when the subject matter is from "its nature exposed to daily variation, the Court "inclines to hold time to be material. This

" principle applies with especial force to con-
" tracts relating to mines; for no science, fore-
" sight, or examination can afford a sure guaran-
" tee against sudden losses, disappointments and
" reverses, and a person claiming an interest
" in such undertakings ought, therefore, to show
" himself in good time, willing to partake in the
" possible loss as well as profit."

Fry on Specific Performance, p. 215, top
315—6 margin, sections 714–716.

From this consideration of the doctrine of abandonment, we make these conclusions, applicable to this case: That a party must be conclusively presumed to intend the natural consequences of his acts, and that the abandonment of a mining claim, which is held by location and work, may be presumed, from a cessation of work for an extended period of time, as for a period equal to the time of the Statute of Limitations, where no intention to hold on to the claim, or to return to the enjoyment and use of it is manifested by the party, and where he stands by for years and sees another, acting under the apparent abandonment, expending labor and money in improving and developing it, and takes no steps to assert a claim, until, by this means, the mine is proven valuable, and he brings suit to recover possession of it; and that the intention of the party charged with abandonment to return to the property must be manifested by open and unequivocal acts.

Counsel on the other side say that abandonment is a question of intention, and that this intention must be shown. We contend that it is shown by the finding of the fact that Taylor did not work upon the claim for over eleven years, and stood silently by, without any assertion of right, or any act or claim of ownership, while the defendant and its grantor worked the ground and discovered its value. If there was any act manifesting an intention on his part to resume work, it is not shown. If there was any explanation of his long continued non-user, it is not found. There is no showing of any declaration or act of Taylor during this period of more than eleven years preceding this suit indicating any claim to or intention to work the ground, and there is no showing even of any secret or unexpressed intention to claim or work it.

But counsel on the other side and the Court below seem to consider that the allegation that plaintiff and defendant were tenants in common, will make the work of defendant good for plaintiff, and prevent the legal conclusion of abandonment.

A tenancy in common is not established by the findings.

The finding, 13th, that they "*are tenants in common*," is a *conclusion* from facts which have not been found.

We think it is demonstrated in the opening brief for the Union Company that the findings are insufficient to sustain this conclusion.

There is no presumption, then, arising from this relation between the parties to withstand the presumption of abandonment arising from the facts which are found.

But counsel on the other side say they can recover upon an actual prior possession of Taylor without the finding of any better title.

This is impossible without a finding of non-abandonment: for the right growing out of actual possession is lost when the actual possession is relinquished, and there can be no presumption of such a right continuing, and the unrebutted presumption of abandonment arising from non-work would control.

But even if a tenancy in common is considered found, when it is accompanied by findings of non-work for over eleven years with continued work during this period by the in-staying tenant, and that the property is on the public land or is such property as is held by mere location and work, the doctrine, that the work of the in-staying tenant should be considered work for the tenant who quits work, should not apply.

That the possession of one tenant in common should be considered constructively possession for another, is a proper rule where the title is in fee simple, but it is not a proper rule, and should not be applied, where the title is possessory merely.

It is a plain proposition that Taylor could abandon even when his co-tenants went on working, and whether they held adversely to him or

not. The moment that he did abandon his interest, any previous relation of tenancy in common ceased, and the magic of that relation cannot be invoked to give him property which he quit as worthless, and which he sues to recover after eleven years, when it has become valuable by the long continued labor and expensive developments of defendant and its grantor. The main object of the mining law permitting the occupation of mining ground, is that it may be worked and its hidden treasures thereby obtained. If it is not subjected to this beneficial use by an occupant and he thinks it cannot be made to pay and quits work, it is the policy of the law that his interest shall pass to another who will work it. Therefore, this doctrine of abandonment should be liberally held in favor of the abandonment.

Respectfully submitted,

Harry D. Thornton

Of Counsel for Plaintiff in

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE UNION CONSOLIDATED SILVER MINING COMPANY,

Plaintiff in Error,

vs.

JAMES D. TAYLOR,

Defendant in Error.

Brief of Defendant in Error.

H. E. L.
~~LEWIS &~~ DEAL,

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IN THE

Supreme Court of United States.

JAMES D. TAYLOR,
Respondent in Error.

vs.

THE UNION CONSOLIDATED SILVER MINING CO.,
Plaintiff in Error.

I.

As the brief for plaintiff in error contains a full statement of the facts of this case so far as they may be necessary to enable the Court to understand the assignment of errors relied on, we do not deem it necessary to make any further statement, but will proceed at once to the discussion of the various points made and positions taken by counsel on the other side; and

1st. It is contended that the special findings by a Judge should contain all the requisites of a special verdict, and this because Section 649 of

the Revised Statutes declares that such special findings shall have the same *effect* as the verdict of a jury; but that section does not declare that such special findings shall be in the form, or possess all the requisites of such verdict. There is a marked distinction between what is in fact declared by the section and the assumption of counsel. That special findings shall have the same effect as a verdict and that they shall possess all the requisites, and be in the form of a special verdict, are very different things. The section in question nowhere indicates that such findings shall be in the form, or possess all the requisites of such verdict. The provision is simply that they shall have the same *effect* as a verdict. If Congress intended that the findings should be in form as a special verdict, or have all its requisites, it would doubtless have so provided. Having only declared what the *effect* of such findings shall be, it is manifest that there was no intention to legislate concerning their form or requisites. But if the findings are required to be as full and specific as a special verdict, then

2d. The plaintiff in error cannot raise the objection in this Court that they are not sufficiently specific, or full, nor that they are not in form; because the attention of the Court below was in no way called to any defect, or want of form; nor, indeed, was there an intimation that there was any objection to the facts as found. Certainly this Court should only review such matters as were brought to the attention of the Court below, and

upon which it had an opportunity to rule. Justice to litigants clearly requires such to be the rule, and that is very generally the practice in the Courts of the various States.

Algier vs. Steamer Maria, 14 Cal., 168;
Park vs. Hinds, 14 Cal., 415.

If such were not the rule, a party might sit by, let an erroneous action of the Court pass unnoticed, and if the ultimate result were unfavorable to him, sue out a writ of error and so continue through an indefinite period without giving the Court below an opportunity to correct its error. This Court has at least intimated that such practice will not be sanctioned, and apparently held that an exception to findings or to their insuffiency, is necessary to justify it in reviewing the findings.

In Railroad Co. vs. Lindsay, 4th Wallace, 656, the Court say: "The other error insisted upon is that there is a fatal variance between the facts as found by the Court, and by the case made by the plaintiffs' petition.

"It does not appear that any of the evidence offered by the plaintiffs in the Court below was objected to by the defendants; nor does it appear that any exception was taken when the Court announced its findings, or subsequently when the judgment was rendered.

"It was in the power of the Court to permit the petition to be amended, and the proper amend-

ments would doubtless have been made if the objection had been stated. It is presented for the first time in this Court. Under these circumstances, it must be held to have been waived by the plaintiffs in error in the Court below, and they are concluded by that waiver in this Court."

See also Walker vs. Sauvient, 2 Otto, 90.

So, here, if the plaintiffs in error had suggested the want of a finding, or that the facts as found were not sufficiently specific, or that they were not in proper form, or that the conveyances should be found in *hæc verba*, the omitted findings could have been supplied, and the conveyances could have been found in *hæc verba*. This not having been done, it seems to us it should be held as in Railroad vs. Lindsay, that any defect or error in the findings were waived.

We do not claim that when the facts as affirmatively found show that the judgment of the Court is wrong, any action on the part of the party complaining is necessary; but when the complaint is that the Court below has not found sufficient facts, or where the facts are informally or insufficiently found, that in such case the attention of the Court should be drawn to such informality or insufficiency. In other words, if the matter complained of be such as, that if the attention of the Court were called to it, it might be corrected, then it is incumbent on the person complaining to direct the attention of the Court to it; otherwise, if it appear that no correction can be made.

Again, Congress has provided that "The practice, pleadings and forms and modes of proceeding in civil cases, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like cases in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of the Court to the contrary notwithstanding." Revised Statutes, Sec. 914.

Now, the practice in this State, as declared by Section 1669 of the Compiled Laws is, that "In cases tried by the Court without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding, or to the want of a finding, and in case of a defective finding, the particular defects shall be specifically and particularly designated, and upon the failure of the Court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the Judge, as in other cases, *provided* that such exceptions to the finding, or want of a finding, shall be filed in the Court within five days after the making of the finding, or decision to which exception is taken."

Now, we claim if the practice of the State be adopted by Section 914, it was incumbent upon the plaintiff in error to take exception to the findings, or to the want of a finding, if it wished to avail

itself of such matter in this Court. It will be seen that certain steps are required to be taken by the complaining party in the District Courts of the State, otherwise he waives or loses the right to rely upon the error or defect complained of.

It may be said that to make this particular practice applicable to the Circuit Courts, would result in curtailing the power of this Court, which it must be admitted was not intended by Section 914; but we answer that it does not so operate any more than any modification of the Circuit Court practice might produce the same result. It is true if, independent of this Statute, the want of a finding, or a defective finding, could be taken advantage of in this Court when no exception was taken thereto in the Court below, and if it should be held that that Statute applied to the Circuit Court, and that no review could take place if the State practice be followed; so far, it is true the power of this Court might be curtailed. But may not this, as we have already stated, be the result in many cases where the Circuit Court practice is manifestly modified by the practice of the State? The power of this Court is not directly interfered with, but only incidentally as the result of a modification of the practice of the lower Court.

For these reasons, we conclude that no defect in the form of the findings, nor the want of a finding, can be taken advantage of here.

II.

But we contend that it was not necessary for the Court to find the deeds in *hæc verba*. It is only the ultimate or issuable facts which should be found by a special verdict, or by the Court in special findings. It has been held even that the Court may refer to the pleadings for the facts found.

McEwen vs. Johnson, 7 Cal., 258;
Pralus vs. Pacific G. & S. M. Co, 35 Cal., 30.

Thus showing that the ultimate facts to be found are only such as are required to be pleaded.

And, indeed, it has been frequently held that only such ultimate facts should be found, and that it is irregular to find the evidence of such facts.

Hidden vs. Jordan, 28 Cal, 301;
Bower vs. Williams, 11 Wheaton, 415;
Miller vs. Life Ins. Co., 12 Wall, 301.

Now what are the ultimate facts in this case? They are the immediate facts upon which the judgment must rest, and not the evidence of such facts; surely in a case of this kind, not that a conveyance was made in any particular form, or executed in any particular way. The ultimate fact is, was there a transfer of the title from the original locators to the plaintiff. Indeed, if the cases of McEwen vs. Johnson and Pralus vs. Pacific G. &

S. M. Co. correctly announce the law, nothing more was necessary than to find that the plaintiff was the owner of the property, and entitled to the possession of an undivided five feet, and such facts as might be necessary under the plea of the Statute of Limitations; because these are the only two issues raised by the pleadings. To find a deed in *hæc verba* is simply incorporating evidence in the findings—that is the evidence as to whether the title is in the plaintiff. If the deeds should be set out, why not all the evidence touching the plaintiff's title and right of possession. A title to mining claims is frequently created and perpetuated by a compliance with mining rules and the custom of miners. Now, it would be as essential in a case of that kind for the Court to embody in its findings the mining rules and the evidence of the custom, as to find the deed transmitting the title in *hæc verba*.

But we find no case where a jury in an action of ejectment have been required to find a deed in *hæc verba*. In an action upon a covenant, such a finding might possibly be essential under certain issues presented by the pleadings; and evidently it is actions of that kind that are referred to in Bacon's Abr., title verdict, division E., and we doubt if the cases referred to by the author bears out the texts. We have not all the cases at hand, but we find that Busgard vs. Jones, 8 Barn & Cress, referred to by him, in no wise touches the question. If, therefore, the findings trace the title to the original locators, or even to persons having

possession claiming title, that must be sufficient, *prima facie*, to enable the plaintiff to recover.

Is this done? It is found that Payne & Cook located the mining claim in question; that they took possession of the said claim; that they sold and conveyed to Alex. Kennedy, Shepherd McFadden, Edward Maloy and John L. Newman, all their interest in the claim; that during the years 1860, 1861, 1862, 1863 and 1864, the original locators of the claim and others deriving title from them, including Wood, the immediate grantor of plaintiff, and the plaintiff himself, expended over thirty thousand dollars in prospecting and developing said claim.

That on the 11th day of October, A. D. 1862, one Soloman Wood was the owner of at least an undivided fifty feet of said Union claim, deriving his title thereto regularly from the original locators, Payne & Cook, and on that day sold and conveyed by deed to plaintiff in this suit an undivided five feet of said Union claim.

We are unable to see how the title could be more clearly traced to the original locators. But if the title were not sufficiently traced, it will be seen that the Court find that both Wood and Taylor, the plaintiff, were in possession, and they, with their co-owners, expended thirty thousand dollars in developing the claim. This finding shows that both the plaintiff and his grantor were in possession and working the claim during the years above referred to. That fact of itself would be a sufficient find-

ing without tracing the title at all, for mere possession of a mining claim gives title sufficient to authorize a recovery in ejectment.

But, again, we claim that if nothing is necessary except to find the ultimate facts, it would have been sufficient if the Court had simply found that Taylor was the owner of five feet of the claim. This is certainly the *rationale* of the cases of McEwen vs. Johnson, 7 Cal., 258, and Pralus vs. Pacific G. & S. M. Co., 35 Cal., 30.

III.

But it is claimed the findings not only do not show that the Statute of Limitations has not tolled Taylor's right, but on the contrary that they show that he has thereby lost it.

The first finding upon this point is paragraph 7, where the Court finds "That the defendant and its grantors have been in the possession of the ground in dispute for more than two years before the commencement of this action." This is not a finding of an adverse possession. We admitted all through the case that the defendant had been in possession, but claimed that such possession was for o.r benefit as well as for itself. Hence, there was no dispute as to the possession of the defendant; it claimed it, and we admitted it. Indeed, it was necessary for us to prove that fact as we did.

It is in paragraph 12 that the adverse possession is found. It may be that this finding does not clearly find that the ouster occurred within two years prior to the bringing of the suit, but other findings show conclusively that the Statute of Limitations could not possibly have run against the plaintiff.

Paragraph 5 shows that in the year 1863 certain persons claiming from the original locators, conveyed their interests to a corporation organized in and under the laws of the State of California, and paragraph 6 finds that on the 27th day of May, A. D. 1874, the said corporation sold and conveyed all its interest in said claim to the defendant, which is also a corporation organized in and under the laws of the State of California. Now it will be remembered that during the years 1860, 1861, 1862, 1863 and 1864, it is found that the grantor of plaintiff and the plaintiff himself were in possession of the claim, and that they expended thirty thousand dollars in developing it; hence, there can be no pretense that there was an ouster during those years, or at any rate prior to the organization of the California corporation, and acquisition of title by it, which was in September, A. D. 1863. After the organization of that corporation the Statute of Limitations could not run against the defendant in errror, because that Statute expressly provides that it does not run in favor of a foreign corporation, (Compiled Laws, Sec. 1036), and in the following cases the Supreme Court of Nevada has directly held that the Statute does not run in

favor of a corporation created under the laws of another State.

Robinson vs. Imperial S. M. Co., 5 Nev., 44;
Barstow vs. C. P. R. R. Co., 10 Nev., 386;
State of Nevada vs. C. P. R. R., id. 47.

We therefore claim that the Court having found that the defendant and its immediate grantor were foreign corporations, and had been so since 1863, nothing more was necessary, because that finding of itself precludes the defendant from relying on the Statute.

However, it is argued that if the work and possession of the plaintiff in error enured to the benefit of the defendant in error, then there has been no ouster, and therefore Taylor should not recover.

We do not claim, as counsel appears to assume, that a holding by a tenant in common will be deemed a holding for his co-tenant under all circumstances, but that such is the rule, until his holding becomes notoriously adverse, or an ouster occurs. There is certainly no conflict of authority on this point.

See cases collected in Freeman on co-tenancy, under Sections 166 and 167:

Waring vs. Crow, 11 Cal., 366;
Coleman vs. Clements, 23 Cal., 245;
Baker vs. Whitney, 3 Sumner, 485.

To such an extent is the presumption that one tenant in possession is holding for his co-tenant carried, that it is held there can be no ouster until the tenant out of possession has notice of the adverse holding, or of the act constituting the ouster.

Tyler on Ejectment, 882;
Coleman vs. Clements, 23 Cal., 245;
Roberts vs. Margon, 30 Vt., 324;
Holley vs. Hawley, 39 Vt., 534.

Thus it does not matter whether Taylor's co-tenants intended to hold for him or not, if their holding was consistent with the common title; or rather, if nothing was done to apprise the defendant in error of an adverse holding, it is of no consequence what his co-tenant's intention may have been. He had the right to assume that its holding was for him as well as itself, until the contrary was made clearly to appear.

Lawson vs. Cunningham, 21 Ga., 459.

Nor can there be any distinction, in this respect, between a mining claim so held and any other character of real estate. The Supreme Court of this State, notwithstanding the Statute referred to on the other side, has applied the general rule above stated to co-tenants of mining claims.

Van Valkenburg vs. Huff, 1 Nev., 142.

That decision, we presume, disposes of this question, for this Court will accept as final the decision of the Supreme Court of this State construing its own Statutes.

Such, too, has been the uniform ruling of the Supreme Court of California with respect to tenants in common of mining claims; no suggestion ever having been made that the general rule should not apply to such tenants in common.

Waring vs. Crow, 11 Cal., 366;
Clements vs. Coleman, 23 Cal., 245.

The question then is, Was there an ouster? The Court directly finds that before the bringing of this action there was.

Paragraph 12, of findings.

But, independent of that, the defendant denies that on Oct. 11th, 1862, or at any time, we had title. That, of itself, is a sufficient ouster, and dispenses with all further proof upon the subject.

Chason vs. Rankin, 1 Duer, 337.

IV.

Granting, for the purpose of argument, that the title to the mining ground in question was in the United States, counsel thereupon assume—

"1st. That the plaintiff has no title, if Payne and Cook had none; and that Payne & Cook had no title unless their ascertained proceedings produced such a result.

"2d. That an interest in public lands can only be acquired by the express permission of the power intrusted by the sovereign will with the disposition thereof.

"3d. That at the time Payne & Cook posted notices, etc., there was no act of Congress authorizing such proceedings for the purpose of acquiring title to mineral lands.

"4th. That the mining rules of the district in question were not adopted until after such steps had been taken."

There is one general answer to all these propositions, and to the conclusion deduced from them, namely: the plaintiff in error is not in a position to question the legality, or sufficiency, of Payne and Cook's title. It is found by the Court (Paragraph 10) "that plaintiff and defendant both claim and derive title from the same source, the original locators of the Union claim, Payne & Cook." It could not, therefore, question the common title.

Feimester vs. McRovie, 1 Jones (N. C.) L. 547.
Doe vs. Pritchard, 19 Miss., 327.

Nor can tenants in common deny the validity of the common source of title, nor defend them-

selves by proving that the paramount title is in some third person.

Braintree vs. Battles, 6 Vt., 395;
Frank vs. Newcomer, 10 Md., 301;
Jackson vs. Streeter, 5 Cow., 530.

In Bornheimer vs. Baldwin, 42 Cal., 34, which was an action of ejectment, one of the defenses was, that the contract entered into between the plaintiff and defendant, whereby the latter took possession, was void, as against public policy. This defense the Court disposed of in the following manner: "If the case of the plaintiff be otherwise established, the defendant cannot defeat it by the application of the maxim, *Ex dolo malo non oritur actio*, nor set up in his defense that both he and the plaintiff entered on the premises wrongfully in the first instance. Upon well settled principles, he cannot be permitted, if entering and remaining in possession as a tenant in common, to assail the common title, or draw its validity in question."

But, again, we claim that it does not follow that Taylor acquired no title simply because Payne & Cook may have had none, because it is shown by the findings that he and his associates were in the actual possession of the mining claim, and expended twenty-five or thirty thousand dollars in the development of the mine. Mining rights acquired by actual possession, even prior to the Act

of Congress of July, 1866, have always been recognized by the Courts of the Pacific States, and they have uniformly held that priority of possession gave a title good against all the world except the Government of the United States.

So, also, this Court has recognized the same right (Sparrow vs. Strong, 3 Wallace, 104), where the Court say: "We know also that the Territorial Legislature has recognized by statute the validity and binding force of the rules, regulations and customs of mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."

Nor is it of any consequence that no mining rules and regulations existed at the time of location by Payne & Cook, for actual possession has invariably been held to be sufficient to entitle the plaintiff to recover independent of any such rules and regulations.

Table Mountain Co. vs. Stranahan, 20 Cal., 198;

Mallet vs. Uncle Sam, 1 Nev., 188.

Such rules and regulations could no more bind the General Government than could the title ac-

quired without them. Indeed, the question here in no wise involves the attitude or action of Congress. Nor does it matter where the paramount title is, whether in the Government or in an individual. If that question were material in this case, it devolved upon the plaintiff in error to show it. In the language of this Court, in Sparrow vs. Strong, the location was made under the "implied sanction of Congress," and it does not lie in the mouth of the Union Consolidated Company to raise any question as to whether the paramount authority has passed any act authorizing the location of Payne & Cook.

As to the second proposition, we contend that an interest in mining claims can be acquired without the "express permission of the power intrusted by the sovereign will with the disposition thereof." As already stated, Congress has tacitly acquiesced in the location and claim of mining ground; and this Court has also upheld and protected such claims, even when made prior to any act of Congress upon the subject. So the Supreme Court of California, for years prior to any legislation by Congress upon the subject, invariably upheld and protected the first locator of mining claims; holding that priority of possession gave a title sufficient to maintain ejectment, as against all but the United States.

Hughes vs. Devlin, 23 Cal., 501;
English vs. Johnson, 17 Cal., 107.

As to the third proposition, nothing further need be said; for, while we admit that no act of Congress authorizing a location of mining claims existed at the time of Payne & Cook's location, yet we claim, as we have attempted to show, that no such act, or acts, were necessary, because the plaintiff's possession was good as against all but the United States, without any such act.

We also admit the fourth proposition, namely: that there were no mining rules in force in the district when Payne & Cook made their location. But the existence of such rules were not necessary to enable the plaintiff to acquire title.

Table M. T. Co. vs. Stranahan, 20 Cal, 198;
Mallet vs. Uncle Sam, 1 Nev., 188;
English vs. Johnson, 17 Cal., 107.

Actual possession being held by these cases to be sufficient; and the Court here finding that the plaintiff and his grantor were in actual possession, and that they, with their associates, expended a large amount of money in working the same, that alone was sufficient.

If plaintiff in error cannot attack the title of Payne & Cook, or if Taylor acquired a title by reason of his own possession or otherwise, and that title was not tolled by the Statute of Limitations, then the entire argument of counsel as to the effect of the acts of Congress of July, 1866, and May, 1872, is without foundation; for it is

based entirely upon the assumption that Taylor had no title, or was not in possession at the time of the passage of those acts.

But we contend that both acts referred to confirm all claims and titles existing at the time of the passage of those acts, Section 2322 of the Revised Statutes declaring that "The locators of all mining locations *heretofore* made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with the State, Territorial and local regulations, not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically," etc. It is manifest that the object not only of this act, but also of that of July, 1866, was to perpetuate and preserve titles acquired by the miners, rather than to destroy them. Under the act last quoted, if it be shown that our title was recognized by the laws of the State, and the local customs, there can be no doubt but that those acts confirmed such title. The inquiry then is, Was our title such as would be upheld by the Courts of this State? The only grounds taken against it are: First—That the location was not authorized;

and, Second—that the Statute of Limitations had run against it.

Under the laws of this State, the possession of one tenant in common is deemed to be the possession of all.

Mallet vs. Uncle Sam, 1 Nev., 188.

The defendant's possession was, therefore, for the benefit of Taylor, until an ouster occurred, and such possession will be presumed to continue until there is some decisive act indicating an adverse holding.

Van Valkenburg vs. Huff, 1 Nev., 142.

By showing that possession, therefore, we established the possession of Taylor until an ouster was shown.

So, too, under the laws and decisions of the Courts of this State, the Statute of Limitations could not be relied on by the defendant. For it will be seen by the Court that it is not claimed by counsel that the Statute began to run prior to the incorporation of defendant and its grantor, and it could not run afterwards.

Robinson vs. Imperial;
Barstow vs. Central Pacific R. R. Supra.

Under the laws and decisions of this State

therefore, the defenses relied on by the defendant are unavailing. What, then, is the result? This: that under the acts of Congress referred to, Taylor's title was recognized and confirmed.

However, suppose, as argued by counsel, the Court cannot know that the title to the claim in question was in the United States. The answer again is obvious:

1st. The defendant cannot question the title of Payne & Cook, because claiming under them.

See authorities above referred to.

2d. Possession alone creates a sufficient title upon which to recover in ejectment.

Table M. T. Co. vs. Stranahan, 20 Cal., 198; Potter vs. Knowles, 5 Cal., 87.

That possession was shown by us, and the Court also finds the fact.

It is of no consequence, therefore, who claims the paramount title. The question here is not Who is the owner of the legal title? but simply, Is the plaintiff, as between himself and the defendant, entitled to be admitted to the possession? That the paramount title is in another, is matter of defense, and as nothing of the kind was shown, the only question to be determined here is whether the plaintiff has shown such possession as entitles him to recover.

"But," says Tyler, "it is not necessary that the plaintiff show a good and valid title to the land in dispute against all the world. It is only necessary that he prove a good title and right to recover as against the defendant."

Tyler on Ejectment, page 73.

We, therefore, conclude under this head:

1st. That the plaintiff in error cannot attack the title of Payne & Cook, because it claims from them, as Taylor does.

2d. That even if Payne and Cook's location were unauthorized, still the plaintiff should recover, because the findings show that he was in possession, and that possession was continued by the plaintiff in error and its grantor.

3d. That, as the plaintiff would be entitled to recover under the laws and decisions of this State, the acts of Congress of July, 1866, and May, 1872, confirmed his title and right of possession.

4th. That, as the defendant and its grantor have been foreign corporations since the year 1863, at which time it was shown the plaintiff was in possession, the Statute of Limitations did not run against Taylor's title.

Nor can it be maintained that the plaintiff abandoned his right by delay in bringing suit. He had the right to believe until ousted that the defendant was holding possession as well for him as

for itself, and until such acts are done as indicate an intention to hold adversely, the Court must presume that such holding was in fact for the benefit of the plaintiff.

Again, under the decisions of our State, no time short of that prescribed by the Statute of Limitations will constitute an abandonment; and before an abandonment is consummated it must be shown that there was an intention to abandon.

Mallet vs. Uncle Sam, 1 Nev, 188.

In this case nothing of the kind was shown or attempted to be shown.

V.

Was it necessary for the Court to find the quantity of the plaintiff's estate? Clearly not; the action of ejectment is simply for the purpose of determining the right of possession as against the defendant. That right may be based upon a title in fee; upon a leasehold, life estate; or upon priority of possession. It was not necessary to allege by what title Taylor claimed it, or for the Court, or the Jury to find it. We find no decision maintaining any such proposition, nor has it ever been the practice of the Courts to require it. Counsel has not referred to any authorities upon this point, and it is safe to assume that none can be found. It is shown by the findings that Taylor was in actual

possession during the years 1863 and 1864, and his grantor prior to that, between defined boundaries on the north and south.

See Deposition of John W. Mackay, page 9 of Record.

One in possession of lands is presumed to have a valid title thereto. "Indeed," says Tyler, "possession of real estate is *prima facie* evidence of the highest estate in the property, that is a seisin in fee."

Tyler on Ejectment, page 70, and authorities there cited.

Again, on the same page, he says: "Ejectment is a possessory action, and possession is always presumptive of right, and it stands good until other and stronger evidence destroys that presumption." If a plaintiff is entitled to recover upon mere priority of possession, there would appear to be no object in finding the quantity of his estate.

We are unable to see how counsel can claim that the Court has not found the proportionate share of the common property to which plaintiff is entitled. It has distinctly found that Taylor is the owner of an undivided five feet in the property.

Nor should this amount be decreased on account of the fact that there was a dispute as to a portion of the claim. The conveyance to Taylor was not an undivided interest in the six hundred feet, but in the three hundred which was undisputed. Upon what theory then can it be claimed that Taylor's interest should be reduced? If the parties acted upon the assumption that there were six hundred feet in the mine, and Taylor and his grantor acted upon that assumption at the time of the conveyance, and it afterwards turned out that there were but three hundred feet, it might be that his interest should be proportionately reduced. But such is not the case. Again, there is no pretense that the claim has been reduced; it simply appears that a part of it is in dispute only.

Again, it is argued that the finding as to the ouster is not sufficient, because it does not show that the plaintiff was ousted from the entire premises. An understanding of the full purport of this finding will be facilitated by determining what the real issue in the case is. We contend that it is simply whether the plaintiff is entitled to be admitted to the possession of the entire property, not of any particular portion of it. In the complaint it is alleged that the plaintiff is the owner of an undivided five feet of the mining claim described, and is entitled to the possession thereof. That is, he is entitled to be admitted to the possession of the entire three hundred feet described in the complaint. The allegations of

the pleading could mean nothing else. He does not claim the right of possession of any particular portion of the three hundred feet, but of the entire claim. Hence the real issue is as to his right to be admitted to the enjoyment of the whole mine. The defendant denies such right of possession, and thus the issue is squarely presented as to Taylor's right of possession of the whole claim. What then is the "property in dispute?" Clearly the entire three hundred feet. The plaintiff is entitled to the possession of the entire claim as completely as if he were the sole owner, the only difference being that the defendant has the right of possession conjointly with him. The issue being as to the right of possession of the entire three hundred feet, the Court was correct in finding that the defendant was in the adverse possession of the "property in dispute." Nothing less than the whole claim could be in dispute in a case of this kind. It is true the plaintiff has not the entire title, but he has the right of possession to the entire property, and it is alleged and shown that he has been ousted from the whole of it.

Again, there could not, in the nature of things, be an ouster of a tenant in common from his entire interest, except when he is ousted from the entire property. Suppose it be admitted that the language, "property in dispute," referred to the undivided five feet. How could there be an ouster from such undivided interest except by an ouster

from the entire property. So, too, the facts found by the Court should be confined to the issues made by the pleadings. Now, in this case, the issue as to the ouster is, whether the defendant ousted the plaintiff from the entire claim. The complaint alleges such to be the fact, and the answer denies it. There is no pretense in the case of an ouster from any particular portion of the property. Hence, the only question which could properly be submitted to the Court was: whether the plaintiff was ousted from the whole claim. The "property in dispute," therefore, must be taken to mean the entire claim.

VI.

Passing over the question as to whether the Court below has the power to rule that plaintiff's evidence was not sufficient to warrant a recovery, we come to the question, whether such evidence was in fact sufficient to maintain plaintiff's action.

It is said, not because no valid location was made. Everything that could be done, or that has ever been required by the custom of miners on the Pacific Coast, was done to make the location. A notice was posted designating what was claimed by the locators; and afterwards, they and their grantors went into actual possession and expended large amounts of money in developing the claim. Indeed, under the uniform current of decisions in the Pacific States, since English vs. Johnson,

supra, actual possession is sufficient without any location or marking of boundaries.

But, as already argued, the plaintiff in error cannot question the sufficiency or validity of the location, claiming, as it does, from Payne & Cook, as we do.

So, also, it is argued, even if the location was sufficient, still the plaintiff did not trace his title to the locators by sufficient deeds of conveyance.

We answer: 1st. that no deeds of conveyance at all were necessary; that the mere transfer of possession of a mining claim, with the intention of transfering the title, has always been held to be sufficient where there is no Statute changing the rule.

In Stone vs. the Feather River and Gibsonville Water Co., 14 Cal., 19:

The Supreme Court of California say: The plaintiffs claim to be in possession. It could not be improper, and might have been important, to show that they were in possession *bona fide* under a claim of right, and with title to occupy and enjoy the property. Indeed, we are unable to see why, upon questions as to the occupancy of public mineral lands, a transfer of the right of the occupant to the possession—which is about all his claim to it—is not as good for all purposes to the vendee taking possession, when evidenced by an agreement as by a deed.

Again, in—

Table Mountain Tunnel Co. vs. Stranahan, 20 Cal., 198,

It is said, "We are of opinion that the Court erred in this respect, and that a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of the possession. Rights resting upon possessed only, and not amounting to an interest in the land, are not within the Statute of frauds, and no conveyance other than a transfer of the possession is necessary to pass them."

And the learned Circuit Judge of the United States for the Ninth Circuit, in the District of Nevada, followed the same rule in—

Kenney vs. Con. Virginia M. Co., 4 Sawyer, page 451,

Where he says:

"I have repeatedly held that, in the early days at Virginia, the transfer of the actual possession of a mining claim, and submission to it by possession of the transferee acquiesced in—possession in pursuance of such a transfer acquiesced in was a good transfer of a mining claim, independent of any deed. That was so held in the early days of California down to 1860." And in the same case it is held that the Utah Statute

concerning conveyances did not apply to mining claims.

And, as a matter of course, if no conveyance whatever were necessary, it follows that no seal was essential to any instrument concerning such property, and so it has been held.

Ostman vs. Dixon, 13 Cal., 34.
Ingoldsby vs. Juan, 12 Cal., 564.

As Taylor was shown, and is found by the Court to have been in possession, claiming under or through Payne & Cook, nothing further was necessary.

It was, therefore, proper for the Court to admit exhibits A and C, for the purpose of showing the character of the plaintiff's possession, and the manner of transmitting the title from the original locators.

It is true, the instrument marked exhibit "C," does not, as argued by counsel, contain words of grant. But instruments of this kind should be construed so as to make them accord with the intention of the parties. Such intention is the first thing to be ascertained, and when ascertained the instrument is interpreted accordingly. Now, Payne & Cook, at the time this instrument was executed, had nothing but a mere location. Probably no work had been done, and no possession taken beyond the mere posting of notices and

marking of boundaries. In such case, we can see no reason why an instrument like that referred to, with possession taken under it, should not be admitted in evidence, if not as a conveyance, still as showing by what right the parties claimed possession.

But, even if the instrument were absolutely void, it was admissible for some purpose, and the objection in the Court below was that it was not admissible for any.

Attwoood vs. Fricot, 17 Cal., 38.

So it must be admitted that, in the body of the instrument, it appears to be only the act of Edward Payne, but being signed by Cook also, it became the act of both. There could be no reason why Cook should sign the instrument unless he intended to be bound by it. And if it were his intention to make it his act, then the Court will hold it to be so, for intention must control in the interpretation of all instruments.

We also insist that the property is sufficiently described. The Comstock stakes were doubtless at that time well known, and the description is: "Six hundred feet of the quartz lead, known as the Comstock lead, running north of the Comstock stakes." This is about as accurate a description as can be found in any of the early deeds of mining claims in this locality; and certainly, if the Comstock stakes were well known,

there could be no difficulty in finding and locating the premises described; for it was only necessary to follow the ledge, or vein, from that point north six hundred feet.

As to exhibit "A," it was properly admitted. When taken in connection with the possession taken under it, it had a tendency to explain the nature of Kennedy & Co.'s possession. The evidence shows that Kennedy and his associates went into possession, and did work on the claim. Now, for the purpose of showing that such possession was obtained from, and held for Payne & Cook, if for no other purpose, it was properly admitted.

Suppose it be conceded that the instrument is a mere contract concerning land; it was still admissible for the purpose above stated, and if the authorities holding that no instrument whatever was necessary to transfer the title to mining claims, correctly announce the law, then surely there was no error in admitting the instrument.

But, if it were admitted that these instruments should not have been received, it cannot be said that the plaintiff in error was injured thereby, because Taylor's possession alone entitled him to recover in this action; and this Court will not reverse a decision where no injury appears to have resulted from the error complained of.

Railroad Company vs. Lindsay, 4 Wallace, 656.

Nor was there any error in admitting the mining rules of the Gold Hill district. They were not introduced for the purpose of showing the regularity of the location, but only for the purpose of showing that the locators complied with those rules after they were adopted; that is, with respect to the amount of work required to be done annually, etc. Nothing else was claimed, or, indeed, could be claimed therefrom.

Respectfully submitted,

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